# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 180.

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THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, PETITIONER,

*vs.*

THE PENN PLATE GLASS COMPANY AND WILLIAM L. KANN.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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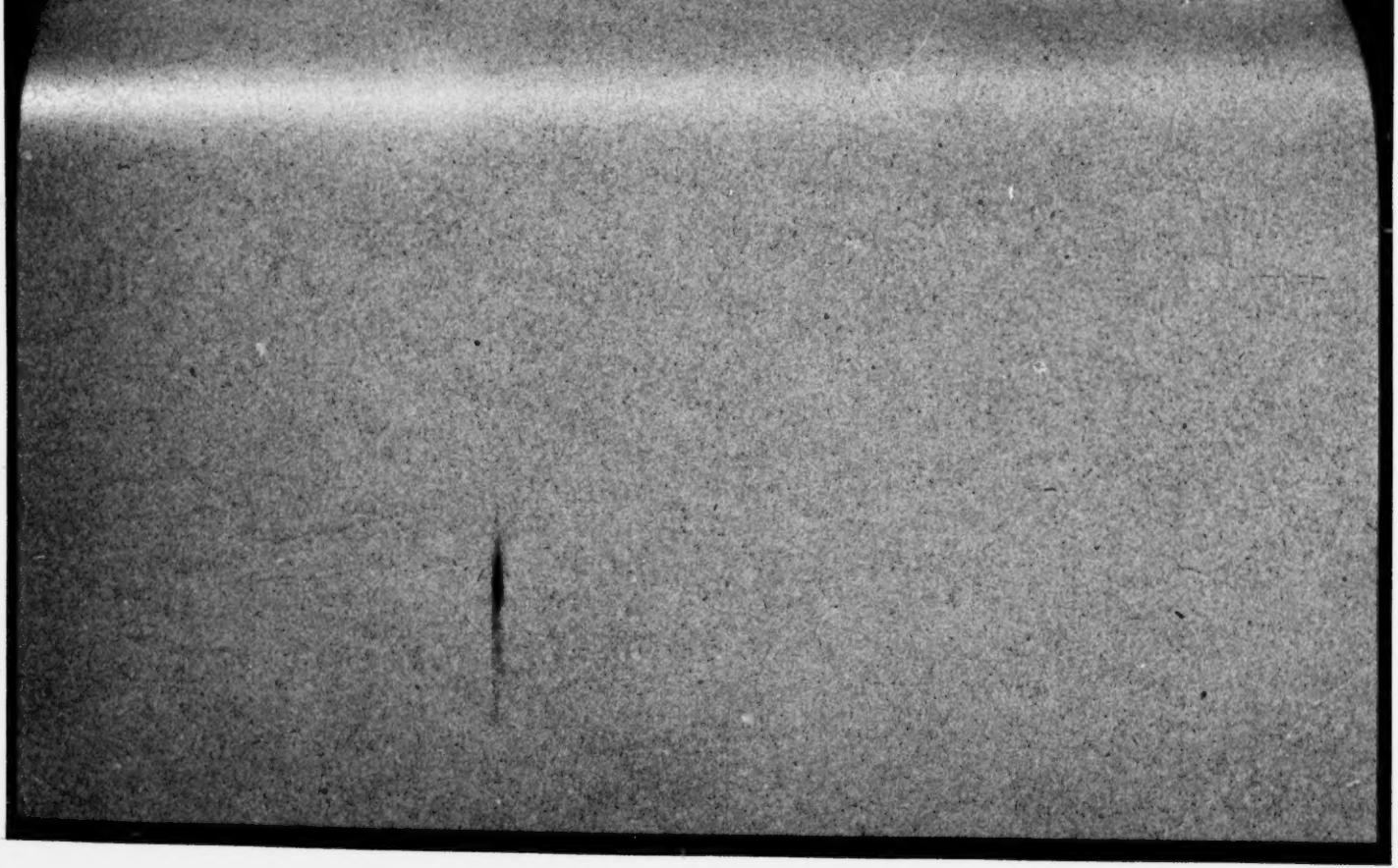
PETITION FOR CERTIORARI FILED OCTOBER 24, 1900.
CERTIORARI AND RETURN FILED NOVEMBER 28, 1900.

(17,942.)



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IN THE

# United States Circuit Court of Appeals,

## THIRD CIRCUIT.

## IN EQUITY.

**No. . SEPTEMBER TERM, 1899.**

**THE PENN PLATE GLASS CO. and WM. L. KANN, APPELLANTS,**

**vs.**

**THE FARMERS' LOAN AND TRUST CO., TRUSTEE, APPELLEE.**

# RECORD, Vol. I.

TURNER, McCLURE & ROLSTON,
J. S. & E. G. FERGUSON,
*Solicitors for Appellees.*

S. & S. B. SCHOYER,
*Solicitors for Appellants.*

1*a* In the United States Circuit Court of Appeals, Third Circuit, September Term, 1899.

THE PENN PLATE GLASS CO. and WM. L. KANN, Appellants,
*vs.*
THE FARMERS' LOAN AND TRUST CO., Trustee, Appellee. } No. —.

Among the rolls, records and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania, at No. 6 of November term, 1896, may be found the following words and figures, to wit:

*Docket Entries.*

THE FARMERS' LOAN AND TRUST Company, a Corporation Duly Created by and under the Laws of the State of New York and a Citizen of the State of New York,
*vs.*
THE PENNSYLVANIA PLATE GLASS Company, a Corporation Duly Created and Existing under the Laws of the State of Pennsylvania and a Citizen of said State; The Penn Plate Glass Company, a Corporation Duly Created and Existing under the Laws of the State of Pennsylvania and a Citizen of said State, and William L. Kann, a Citizen of the State of Pennsylvania.

Bill filed July 8, 1896.

Same day subpœna issued, returnable first Monday of August next.

Same day motion for and order fixing time for hearing motion for the appointment of a receiver and motion for a preliminary injunction filed.

1896, July 10. Aff'ts of Jos. Garrison *et al.* and Whittlesey D. Searls on part of pl'ff filed.

1896, July 10. Subpœna returned served July 8, 1896, on the Pennsylvania Plate Glass Company by giving a true and attested copy thereof to Phillip Semmer, president of said defendant company, at his

2*a* office in the city of Pittsburg, also served on said defendant at same time. Notice of hearing of motion for preliminary injunction by giving copy of order to its said president. Same day served writ and like notice on Penn Plate Glass Co. by giving a true and attested copy to William L. Kann, president of said defendant company, at its office in the city of Pittsburg, giving him also a copy of said notice. Same day served writ and notice on William L. Kann by giving him a true and attested copy of said order at his office in the city of Pittsburgh. Mar. $9.00.

1896, July 10. Hearing of motion for appointment of receiver and motion for injunction adjourned to July 20, 1896.

1896, July 20th. Motion for receiver argued. *C. A. V.*

Same day exemplification of record of petition for order of sale, decree of sale and confirmation of sale filed.

Same day aff'ts of Francis T. Junkin, W. L. Kann, Emanuel Wertheimer and Julius Dreyfus filed.

1896, July 24. Aff't of J. W. Stoner filed. Insurance contract filed.

1896, Sept. 7th. Order denying motion for the appointment of receiver filed. Same day order extending time one week for filing plea, answer or demurrer filed.

1896, Sept. 14. Joint and several answer of Penn Plate Glass Co. and W. L. Kann filed. Demurrer of Penn Plate Glass Co. filed and demurrer of W. L. Kann filed.

1896, Oct. 28. Complainant's exceptions to the joint and several answer of Penn Plate Glass Co. and W. L. Kann filed.

1897, Jan'y 8. Order filed fixing Jan'y 16, 1897, for hearing and argument on the demurrers and complaimant's motion for reference to master to pass on exceptions to answer filed.

1897, Jan'y 16. Demurrer and exceptions to answers argued. *C. A. V.*

1897, March 1. Opinion of the court overruling complain-
3*a* ant's exceptions filed, and order filed overruling demurrer.

1897, March 31. Notice of taking testimony on part of complainant with acceptance of service of same filed.

1897, April 5. Replication filed.

1897, April 19. Testimony on part of complainant taken before T. F. Daniels, New York, received and filed.

1897, Dec. 9. Order appointing H. D. Gamble special examiner on part of defendants filed.

1898, Feb'y 10. Testimony and exhibits on part of defendants filed.

1898, April 16. Petition of complainant for appointment of a temporary receiver and to have certain insurance monies impounded or assigned to complainant and affidavit of W. L. Kann in answer thereto filed and motion argued. *C. A. V.*

1898, April 30. Motion to withdraw petition for temporary receiver, &c., filed and motion argued in part.

1898, May 4. Answer to motion to withdraw petition for receiver, &c., filed and argument concluded.

1898, May 7. Opinion filed allowing order to be drawn permitting complainant to withdraw petition for receiver, &c.

And now, May 26th, 1898, on presentation of petition, hearing of counsel, and upon due consideration thereof, leave is hereby granted to petitioner to file the supplemental bill as prayed for.

1898, May 28. Petition for leave to file supplemental bill and answer thereto filed.

1898, May 28. Supplemental bill filed by leave of court.

1898, May 21. Subpœna sur-supplemental bill issued, returnable first Monday of July next.

1898, June 27. Demurrer to supplemental bill filed.

1898, June 9. Præcipe filed for the appearance of J. H. Harrison, Esq., for the following parties, to wit: (1) Niagara Fire In-
4*a* surance Co. of New York, (2) Erie Insurance Co. of Buffalo, N. Y., (3) Insurance Company of the State of New York, (4) Globe Fire Insurance Co. of New York, (5) Broadway Fire Insurance Co. of N. Y., (6) E. C. Jameson and S. F. Frelinghuysen, as firm of Jameson & Frelinghuysen, attorneys-in-fact for Manufacturers' Lloyds of N. Y., (7) Schuylkill Fire Insurance Co. of Philadelphia, (8) State Insurance Co., of Philadelphia, (9) Manufacturers' and Merchants' Insurance Co., of Concord, N. H., (11) Washington Insurance Co., of Cincinnati, O., (12) Transatlantic Fire Insurance Co., of Germany, (13) North German Fire Insurance Co., of Germany, (14) Netherlands Fire Insurance Co., of the Hague.

1898, June 13. Præcipe for appearance of Watterson & Reid, for Connecticut Fire Insurance Company of Hartford, filed and for City Ins. Co.

1898, June 17. Præcipe filed for appearance of J. J. Miller, Esq., for Springfield Fire and Marine Insurance Company, garnishee.

1898, June 9. Præcipe for appearance of J. W. Hall, for the Ben. Franklin Insurance Company of Allegheny, filed.

1898, June 18. Petition and motion for the appointment of a receiver and sale of the mortgaged property filed.

1898, June 20. Copy of petition and notice of motion for the appointment of a receiver and sale of property served on Farmers' Loan and Trust Company in New York by William Henkel, marshal of southern district of New York.

1898, June 22. Answer of Farmers' Loan and Trust Company to petition of Penn Plate Glass Company, filed June 18th, filed.

1898, June 22. Petition of Penn Plate Glass Company for appointment of a receiver to collect and take charge of insurance monies *pendente lite* filed.

1898, June 23. Appearance of E. Z. Smith, Esq., for Artizans' Insurance Company, filed.

5*a* 1898, June 25. Answer of the Farmers' Loan & Trust Co. to the petition of Penn Plate Glass Company of June 22, 1898, for appointment of receiver to collect insurance monies filed.

1898, June 25. Petitions of the Penn Plate Glass Company for the appointment of a receiver argued. *C. A. V.*

1898, June 28. Præcipe for appearance of Baldwin & Collins, Esqs., for Hartford Insurance Company of Hartford, filed.

1898, June 29. Præcipe for appearance of S. S. Mehard, Esq., for Spring Garden Insurance Co., filed.

And now, June 29, 1898, after *agreement* and on due consideration, the foregoing demurrer is overruled with leave to respondents to answer over within twenty days.

1898, July 1. Præcipe for appearance of John A. Wilson, Esq., for Pittsburgh Insurance Company, filed

1898, July 1. Præcipe for appearance of Way, Walker and Morris, Esqs., for the Palatine Insurance Company of Manchester, England, filed.

1898, July 1. Præcipe for appearance of W. A. Lewis, Esq., for Monongahela Insurance Company of Pittsburgh, filed.

1898, July 2. Præcipe for appearance of Scott & Gordon, Esqs., for the following defendants, filed: Monongahela Insurance Company of Pittsburgh; Insurance Company of North America of Philadelphia; Teutonia Insurance Company of Allegheny; Armenia Insurance Company of Pittsburgh; City Insurance Company of Pittsburgh; Insurance Company of the State of Pennsylvania of Philadelphia; Franklin Fire Insurance Company of Philadelphia; Pennsylvania Fire Insurance Company of Philadelphia; Farmers' Insurance Company of York; Mutual Protection Fire Insurance Company of Boston; Assurance Company of America of New York; Eastern Insurance Company of New York; Lafayette Fire Insurance Company of New York; Westchester Fire Insurance Company of New York; Manhattan Insurance Company of New York;
6a Pacific Fire Insurance Company of New York; Norwood Insurance Company of New York; Hanover Fire Insurance Company of New York; Queen (America) Insurance Company of New York; Victoria Fire Insurance Company of New York; National Standard Insurance Company of New York; Mutual Fire Insurance Company of New York; Farragut Fire Insurance Company of New York; Colonial Assurance Company of New York; Commonwealth Insurance Company of New York; Citizens' Insurance Company of New York; Ætna Insurance Company of Hartford; National Fire Insurance Company of Hartford; American Central Insurance Company of St. Louis; Merchants' Insurance Company of Providence; Virginia State Insurance Company of Richmond; Atlanta Home Insurance Company of Atlanta; St. Paul Fire and Marine Insurance Company of St. Paul; Grand Rapids Fire Insurance Company of Grand Rapids; Southern Insurance Company of New Orleans; Scottish Union and National Company; Commercial Fire Insurance Company of Scotland; Caledonian Insurance Company; Scottish Alliance Insurance Company of Glasgow; North British and Mercantile Insurance Company; Commercial Union Association Company, Limited; Atlas Assurance Company; Union Assurance Society; Phœnix Assurance Company; Imperial Assurance Company, Limited; The Northern Assurance Company; Liverpool and London and Globe Insurance Company of Liverpool; Palatine Insurance Company; Manchester Fire Assurance Company; Hamburg-Bremen Fire Insurance Company; Aachen and Munich Fire Insurance Company of Munich; Aachen-Leipzig Insurance Company of Aix-la-Chapelle; Magdeburg Fire Insurance Company of Magdeburg; Svea Association of Gothenburg, and the Urbaine Belgæ Insurance Company of Brussels; William Adams, J. Stanley Lockwood and Remy R. Foreman, all of New York, constituting the firm of Adams, Lockwood & Foreman, attorneys-in-fact of the Traders' Fire Lloyds Insurance Company of New York.

7a 1898, July 1. Appearance of George Tucker Bispham for the Pennsylvania Fire Insurance Company filed.

1898, July 2. Stipulation of the Farmers' Deposit national bank to hold bonds with certificate of Emanuel Wertheimer as to ownership

thereon, like stipulation with certificate of no interest thereon, stipulation of Emanuel Wertheimer and W. L. Kann as to their liability, stipulation for withdrawal of bonds from participation in insurance funds, schedule of bonds deposited in Farmers' Deposit national bank by Emanuel Wertheimer July 2nd, 1898, and bond of Emanuel Wertheimer, receiver, with approval of the court thereon, filed.

1898, July 2. Decree appointing Emanuel Wertheimer receiver of the insurance monies filed.

1898, July 12. Answer to supplemental bill filed.

1898, July 23. Order filed extending time for answering or demurring to the first Monday of September, 1898, as to the defendants for whom Scott and & Gordon have entered their appearance.

1898, July 26. Præcipe for appearance of Dalzell, Scott & Gordon for the Citizens' Insurance Company of St. Louis, Mo., filed.

And now, August 3d, 1898, the Springfield Fire and Marine Insurance Company of Springfield, Mass., have paid this day to the receiver the full amount of admitted loss.

S. SCHOYER, JR.,
*Attorney for E. W., Receiver.*

And now, August 5th, 1898, the receiver, acknowledges payment in full of insurance from the following companies, defendants:

American Fire Ins. Company of New York, Aachen Leipziger, Limited, Germany, American Central, Missouri, Aachen Munich, Limited, Germany, Ætna, Connecticut, Atlanta Home, Georgia, Atlas Assurance, Engla-d, Artisans', Pennsylvania, Armenia, Pennsylvania, Assurance of America, New York, Ben. Franklin,
8a Pennsylvania, Caledonia, Scotland, Citizens', Missouri, Citizens', New York, City Ins., Pittsburgh, Colonial Assurance, New York, Commercial Union, England, Commonwealth, New York, Equitable Fire and Marine, Rhode Island, Erie Fire, New York, Farmers', York, Pennsylvania, Farragut, New York, Fire Association of Philadelphia, Franklin of Philadelphia, Grand Rapids, Michigan, Hamburg-Bremen, Germany, Hamburg Underwriters', Germany, Hanover, New York, Hartford Fire, Connecticut, Insurance Company of North Am., Pa., Insurance Company of State of Penna., Lafayette Fire Insurance Company, Law Union Crown F. & L., England, Liverpool, London & Globe, England, Manchester Fire England, Merchants' and Manufacturers' Fire, Maryland, Merchants', Rhode Island, Monongahela, Penna., Mutual Fire, New York, National Fire, Connecticut, Netherlands Fire, Holland, Niagara Fire, New York, North British & Merchants', England, North German Fire, Germany, Norwood, New York, Pacific Fire, New York, Penna. Fire, Penna., Phœnix, New York, Phœnix Assurance Co., England, Pittsburgh Ins. Co., Penna., Queene, New York, Scottish Union & National, Scotland, Southern, Louisiana, Svea Assurance, Sweden, Teutonia, Pennsylvania, Union Assurance, England, Underwriters' Policy, New York, Victoria Fire, New York, Virginia F. & M., Virginia, Washington Ins., Ohio, Westchester Fire, New York, Palatine Ins. Co., Limited, England, Eastern, New York,

St. Paul Fire and Marine, Magdeburg, Germany, Traders' Lloyds Ins. Co., National Standard, Transatlantic, Germany, Imperial, London, Continental, New York, Niagara, New York, Northern, London.

S. SCHOYER, JR.,
*Attorney of E. Wertheimer, Receiver.*

1898, August 10. Notice of complainant's counsel to produce witnesses at the hearing fixed for August 16th, filed.

1898, August 16. Order entered that The Farmers' Loan &
9*a* Trust Co., pl'ff, be authorized to expend necessary sums to keep the mortgaged premises safe and free from injury, &c.

1898, August 16. Ordered that testimony on both sides be taken as closed, and this cause and the supplemental bill be set down for argument on Wednesday, Sept. 28th, 1898, on supplemental bill, original bill, answers, replications and testimony already taken under the original bill, and such testimony as may be taken under the supplemental bill and answer prior to Sept. 28th, 1898.

1898, August 27th. Replication to answer to supplemental bill filed.

1898, August 31. The following insurance companies have paid the amounts of their policies in full:

Connecticut Fire Ins. Co., Hartford; Schuylkill Ins. Co., of Pennsylvania; Scottish Alliance; Capital Ins. Co. of Concord; Argus Ins. Co.; L'Urbaine Belgæ.

S. SCHOYER, JR.,
*Attorney of E. Wertheimer, Receiver.*

1898, Sept. 5. Notice of taking testimony with exceptance thereof filed.

1898, Sept. 5. Agreement of counsel in regard to testimony filed.

1898, Oct. 6. Petition of the Penn Plate Glass Company for the appointment of a care-taker for the mortgaged premises filed.

And now, Oct. 6th, 1898, on motion of counsel for petitioner, a rule is granted on complainant to show cause why it should not be removed from the care and control of the mortgaged premises and a substitute appointed, returnable Oct. 10th, 1898, at 10 o'clock.

BY THE COURT.

1898, Oct. 17. Petition of the Manhattan Fire Insurance Company of New York *et al.*, for an order directing Emanuel Wertheimer, receiver, to stay all proceedings in actions in the supreme court of the State of New York against said petitioners until final decree
shall have been entered in the suits in equity brought by
10*a* said petitioners against said receiver and the Penn Plate Glass Company filed.

And now, to wit, October 17th, 1898, the foregoing petition presented at chambers, and thereupon leave is granted to file the same and rule is granted upon Emanuel Wertheimer, receiver of the Penn Plate Glass Company, to appear and show cause, if any he

has, why the prayer of the said petitioners should not be granted, returnable the 17th day of October, 1898, and the court do further fix the said rule for hearing on the 24th day of October, 1898, at 10 o'clock a. m.; and it is further ordered that the said Emanuel Wertheimer, receiver of the Penn Plate Glass Company, do stay all proceedings in said suits pending in the State of New York until after the hearing of this rule, to wit, until Oct. 25th, 1898.

BY THE COURT.

And now, Oct. 24th, 1898, the motions of Scott & Gordon, Esqs., on behalf of the Manhattan Fire Insurance Company, the Insurance Company of the State of New York, the Globe Insurance Company of the City of New York, Broadway Insurance Company of the City of New York, and Frank Hiscock *et al.*, composing the Manufacturers' Lloyds, to stay further proceedings in actions instituted by Emanuel Wertheimer, as receiver of the Penn Plate Glass Co., in the supreme court of the State of New York, against the said insurance companies, and also for leave to file separate bills against the Penn Plate Glass Co. and Emanuel Wertheimer as receiver, to set aside the award of the appraiser adjusting the amount of the losses claimed under said policies, coming on to be heard, and upon consideration thereof, it is now ordered that, in the event that each of said insurance companies above named shall execute and file in this court its individual bond as hereinafter provided, with a surety by a company duly authorized thereto and approved by this court, on or before Friday, October 28th, 1898, the said actions shall be stayed as to such company until the further order of the court; the bond of the
11*a* Manhattan Fire Insurance Company shall be in the sum of $22,000; the bond of the Insurance Company of the State of New York shall be in the sum of $7,000; the bond of the Globe Insurance Company of the City of New York shall be in the sum of $4,000; the bond of the Broadway Insurance Company of the City of New York shall be in the sum of $2,500; the bond of Frank Hiscock *et al.*, composing the Manufacturers' Lloyds, shall be in the sum of $5,000; each of said bonds to have the following condition, namely: that the insurance company (furnishing the bond) will pay to Emanuel Wertheimer as receiver of the Penn Glass Co. the amount of any decree that may be rendered in the said action or proceeding to be brought by it upon any cross-bill that may be filed by the said receiver, setting up his cause of action upon the policy or policies of insurance issued by such company, or the awards thereon, together with the costs of the action or proceeding, and all costs that may have accrued or that become taxable in the action now pending against it in the supreme court of New York; then the said obligation to be void, otherwise to be of full force and effect; it is further ordered that, in the event that the said bonds as hereinbefore directed shall be filed within the time aforesaid, then and in that event the said several companies above named shall have leave to file their said bills in equity; with leave to Emanuel Wertheimer, receiver, to file his cross-bill to each of the said bills; it is further

ordered that the pleadings shall be so conducted as that the issues shall be duly framed and the testimony on behalf of the plaintiff shall be concluded within thirty days after the appointment of an examiner, who shall be appointed within five days after issue joined; it is further ordered and directed that, in the event any of the said bonds shall not be filed as above directed on or before Friday, October 28th, 1898, that then the said motions for leave to file said bills and for the stay of the New York actions shall be denied
12*a* and the conditional stay granted as to such defaulting company as aforesaid shall be and the same is hereby vacated.

1898, Oct. 28. Answer of Farmers' Loan & Trust Company to petition of Penn Plate Glass Co. for the removal of Farmers' Loan & Trust Co., as care-taker of the mortgaged premises filed.

1898, Oct. 28. Affidavit of John A. Nichols with order thereon extending time for filing bond of Manufacturers' Lloyds to Nov. 1st, 1898, inclusive, and staying proceedings granted in order *to* Oct. 24th to said date filed.

1898, Oct. 28. Bonds of the Manhattan Fire Ins. Co. of New York, the Globe Fire Ins. Co. of the City of New York and Broadway Ins. Co., of City of New York, approved and filed.

1898, Nov. 1. Bonds of the Manufacturers' Lloyds and the Insurance Company of the State of New York, approved and filed.

1898, Nov. 1. Bond of the Manufacturers' Lloyds and the Insurance Company of the State of New York, approved and filed.

And now, to wit, November 12th, 1898, it appearing to the court that the Farmers' Loan & Trust Company, which was authorized and empowered by an order of this court made on the 16th day of August, 1898, to expend such sums of money as might be reasonably necessary to keep the premises described in the mortgage for the foreclosure of which the bill in equity in this case was filed, safe and free from injury by the elements or otherwise, has resigned as care-taker of the said property the court appoint Fred. C. Leonard as care-taker of said property, and the said Leonard is ordered and directed to go upon and visit and examine said property, and ascertain what in his judgment is requisite and necessary in the way of employment of watchmen, purchasing material, etc., to properly protect and take care of said property and for covering the same, and thereupon to make report to the court, together with a
13*a* statement of the proposed expenditure; notice of which said report, before any further order is made thereon, shall be given to the local attorneys of record of the parties, so as to afford an opportunity to the said parties to oppose any charge or expenditure which they may think too great or unreasonable which objection shall be filed in writing in six days thereafter.

BY THE COURT.

1898, Nov. 12. Withdrawal by defendant of petition for removal of the Farmers' Loan and Trust Company as care-taker filed.

1898, Nov. 10. Resignation of the Farmers' Loan & Trust Company as care-taker filed.

1898, Nov. 26. Report of F. C. Leonard as care-taker, &c., filed.

1898, Nov. 28. Chancery subpœna sur supplemental bill returned served as follows: June 4th, 1898, at Philadelphia, in my district, served the within writ on Insurance Company of North America, at Philadelphia, by giving a true and attested copy thereof to E. L. Ellison, vice-president of the said company, and on Spring Garden Insurance Company of Philadelphia, by giving like copy *of* Clarence E. Porter, secretary of said company, and on Insurance Company of the State of Pennsylvania, at Philadelphia, by giving like copy to Albert B. Earle, secretary of said company, and on Franklin Fire Insurance Company of Philadelphia, by giving a like copy to George T. Reger, vice-president of said company, and on Pennsylvania Fire Insurance Company of Philadelphia, by giving a like copy to C. W. Merrill, assistant secretary of said company, and on Schuylkill Fire Insurance Company of Philadelphia, by giving a like copy to Alexander Balfour, president of said company, and on Springfield Fire and Marine Insurance Company of Springfield, Mass., by giving like copy to Chas. Platt, Jr., State designated agent of said company, and on Assurance Company of America of
14*a* New York, National Standard Insurance of New York, and on Southern Insurance Company of New Orleans, La., and on Commercial Union Association Company, Limited, of London, by giving like copies to Charles Williams, State designated agent of said companies, and on Westchester Fire Insurance Company of New York, by giving copy to Charles F. Evans, State designated agent of said company, and on Manhattan Insurance Company of New York, by giving like copy to William Kane, designated agent of said company, and on Pacific Fire Insurance Company of New York, by giving a like copy to J. W. Buckman, State designated agent of said company, and on Victoria Fire Insurance Company of New York, and on Virginia State Insurance Company of Richmond, Virginia, and on Union Assurance Society, of London, England, and on Transatlantic Insurance Company, of Hamburg, Germany, and on Phœnix Assurance Company of London, England, by giving like copies to George E. Wagner, State designated agent for said companies, and on Globe Fire Insurance Company of New York, and on Grand Rapids Fire Insurance Company, of Grand Rapids, Michigan, by giving like copies to E. R. Hunt, State designated agent of said companies, and on Insurance Company of the State of New York, and on Atlanta Home Insurance Company of Atlanta, Georgia, by giving like copies to Wm. W. Curtin, designated agent of said companies, and on Niagara Fire Insurance Company of New York, and on Connecticut Fire Insurance Company of Hartford, Conn., and on Coledonian Insurance Company of Edinburgh, Scotland, by giving like copies to Henry W. Brown, designated agent for said companies, and on Farragut Assurance Company of New York, and on North German Fire Insurance Company of Hamburg, Germany, by giving like copies to Wm. C. Bennett, State designated agent for said companies, and on Citizens' Insurance Company of New York, and on Scottish Union and National Insurance Company of Edinburgh, Scotland, by
15*a* giving like copies to Samuel D. Hawley, State designated agents for said companies, and on Citizens' Insurance Com-

pany of St. Louis, Missouri, and on Merchants' and Manufacturers' Fire Insurance Company of Baltimore, Maryland, by giving copies to William Brockie, State designated agent for said companies, and on North British and Mercantile Insurance Company of London, England, by giving a like copy to Thomas C. Foster, State designated agent for said company, and on Liverpool and London and Globe Insurance Company, of Liverpool, England, by giving a like copy to Atwood Smith, State designated agent of said company, and on Manchester Fire Assurance Company of Manchester, England, by giving a copy to James S. Young, State designated agent of said company, and on

June 6th. On State Insurance Company of Philadelphia, by giving a like copy to Charles F. Walter, vice-president of said company, and on Lafayette Fire Insurance Company of New York, by giving a copy to Charles F. Walter, designated State agent of said company, and on Broadway Insurance Company of New York, by giving a like copy to *to* B. Mitchell Simpson, State designated agent of said company, and on Magdeburg Fire Insurance Company of Magdeburg, Germany, by giving a like copy to William Arrott, State designated agent of said company, and on Ætna Insurance Company of Hartford, Connecticut, by giving a like copy to Edward J. Durban, State designated agent of said company, and on Hartford Fire Insurance Company of Hartford, Conn., by giving a like copy to Charles A. Hexamer, State designated agent of said company, and on the Merchants' Insurance Company of Providence, and on St. Paul Fire and Marine Insurance Company of St. Paul, by giving like copies to Louis M. Wagner, State designated agent of said companies, and on Atlas Assurance Company of London, England, by giving a like copy to Chas. E. Mather, State designated agent of said company, and on Imperial Insurance Company, Lim-
16*a* ited, of London, England, and on the Northern Assurance Company, of London, England, by giving like copies to James A. McGann, State designated agent of said companies, and on Palatine Insurance Company of Manchester, England, by giving a like copy to Charles E. Lister, State designated agent of said company, and on Hamburg-Bremen Fire Insurance Company of Hamburg, Germany, by giving a like copy to Albert E. Earle, State designated agent of said company, and Aachen and Munich Fire Insurance Company, of Munich, Germany, and on Svea Association of Gotheuburg, Sweden, and on Netherlands Insurance Company of Zutphen, in the Netherlands, by giving like copies to Chas. R. Peck, State designated agent of said companies, and on National Fire Insurance Company of Hartford, by giving a like copy to Thomas McElmell, agent of said company, at its office, 420 Walnut St., Philadelphia, and on

June 4th. On Norwood Insurance Company of New York, by giving a like copy to Louis C. Madiera, agent of said company, at its office, No. 320 Walnut street, Philadelphia, and on June 6th on Colonial Assurance Company of New York, by giving a like copy to Wm. Arrott, agent of said company, at its office, 115 South 4th street, Philadelphia, and on Commonwealth Insurance Company of

New York, by giving a like copy to James F. Stone, agent of said company, at its office, 333 Walnut street, Philadelphia, and on American Central Insurance Company of St. Louis, by giving a like copy to Louis M. Wagner, agent of said company, at its office 328 Walnut street, and on

June 8th. On Erie Fire Insurance Company of Buffalo, by giving a like copy to W. Bennett Gough, agent of said company, at its office, 218 South 4th street, Philadelphia, and on June 8th, on Capital Fire Insurance Company of Concord, by giving a like copy to J. A. Bailey, State designated agent of said company, and on

June 7th. On Farmers' Fire Insurance Company of York, Pa., by giving a like copy to David Strickler, secretary of said com-
17*a* pany, and making known the contents to each of them, and as to Aachen-Leipzig Insurance Company of Aix-la-Chapelle, Germany, not found in the district.

So answers—

JAMES B. REILLY,
*U. S. Marshal,*
Per ABRAM B. MYERS, *Deputy.*

Mar. $129.80.

PITTSBURGH, *May 31st*, 1898.

Service of the writ herein accepted for the Penn Plate Glass Company and W. L. Kann.

S. SCHOYER,
S. B. SCHOYER,
*Attorneys.*

May 31st, 1898, at Pittsburgh, Pa. Service of the within accepted for the Penn Plate Glass Company and W. L. Kann by S. & S. B. Schoyer, Esqs., their attorneys.

June 2, 1898, at Pittsburgh, Pa. Served the within writ on the City Insurance Company of Pittsburgh, by giving a true and attested copy thereof to A. S. Bishop, secretary of said company, and on the Pittsburg Insurance Company of Pittsburgh, by giving a like copy to R. J. McKnight, secretary of said company; and on the Monongahela Insurance Company of Pittsburgh, by giving a like copy to J. H. Claney, secretary of said company, and on the Armenia Insurance Company of Pittsburgh, by giving a like copy to W. D. Gill, secretary of said company; and on the Artisans' Insurance Company of Pittsburgh, by giving a like copy to Chas. P. Smith, secretary of said company; and on the Ben. Franklin Insurance Company of Allegheny, by giving a like copy to W. A. Ford, secretary of said company; and on the Teutonia Insurance Company of Allegheny, by giving a like copy to Henry Gerwig, president of said company; and on the Washington Insurance Company of Cincinnati,
18*a* Ohio, by giving a like copy to R. C. Oehmler, State designated agent for said company in the State of Pennsylvania, on the 4th day of June, 1898.

So answers—

FRED. C. LEONARD,
*U. S. Marshal,*
Per JOE H. IRONS, *Deputy.*

Mar. $20.18.

June 4th, 1898, at Wilkesbarre, Penna. Served the within writ on the Hanover Fire Insurance Company of New York, by giving a true and attested copy thereof to A. F. Derr, designated agent for said company in the State of Pennsylvania.

So answers—

FRED. C. LEONARD,
*U. S. Marshal,*
Per S. A. BACHARACH, *Deputy.*

Mar. $20.12.

1899, Jan. 19. Petition of Penn Plate Glass Company for leave to sell ten steam-engines filed. *Eo die* rule granted on complainant to show cause why prayer of said petition should not be granted returnable Jan. 21, at 10 a. m.

1899, Jan. 21. Report of F. C. Leonard as care-taker filed.

1899, Jan. 25. By order filed, Fred C. Leonard, care-taker, is directed to sell to the American Plate Glass Company the ten stationary engines now upon the property of the defendant company at Irwin, Pa., for the sum of one hundred dollars each, payable in cash upon the delivery of the same; and to hold the amount received therefrom in substitution for said property.

1899, Feb. 24. Opinion of the court filed, holding that the insurance fund, to the extent of all valid outstanding bonds represented by the trustee, is stamped with an equitable lien, and that it is the duty and right of this court to enforce it, and allowing a decree of foreclosure.

And now, July 25th, 1899, this case having come on for hearing upon the original and supplemental pleadings, and upon the
19*a* proofs, after argument by counsel, and consideration thereof, it is ordered, adjudged and decreed, that the mortgage set forth in the original bill of complaint herein, made by the defendant, The Pennsylvania Plate Glass Company, to the complainant, The Farmers' Loan & Trust Company bearing date the first day of January, 1891, is a valid and subsisting mortgage and constitutes a first lien, except as such lien has been released as herein stated, upon the mortgaged premises and property situated in North Huntington township, Westmoreland county, Pennsylvania; that since the making of said mortgage, a small strip of said premises was, in consideration of the receipt of $300 by the complainant herein, duly released from the lien of said mortgage by release executed by the said complainant and recorded in the office of the recorder of Westmoreland county, and the said strip of land released is no longer subject to the lien of said mortgage; and it appearing to the court that since the filing of the opinion of the court herein, the Pennsylvania Railroad Company, claiming to exercise the right of eminent domain under the laws of the State of Pennsylvania, for the purpose of widening, straightening and improving its tracks, has entered into possession of a certain portion of the said mortgaged property and premises, and has given bond in the court of common pleas of Westmoreland county, Pennsylvania, to pay all damages resulting from the said taking and condemnation, it is further ordered, ad-

judged and decreed, that the complainant, as such mortgagee, has a first lien upon any and all damages arising from the condemnation of the mortgaged premises which may be collected under said bond, or because of said taking and condemnation, to the extent hereinafter specified; that the lien of the said mortgage is prior and superior to any other lien or claim of any kind or description in favor of any party to this cause; that default has been made in the payment of interest due on the bonds secured by said mortgage entitling the complainant to a sale of the said mortgaged property herein-
20*a* above described, unless the defendants or some of them shall pay the amount of the entire bonded indebtedness secured by said mortgage, with all the costs and expenses of this suit at a short day to be fixed by the court; that there are secured by said mortgage lien a large number of bonds and coupons, with interest thereon, of the said defendant, The Pennsylvania Plate Glass Company, which are outstanding and past due, such coupons so outstanding and unpaid being coupons which matured and fell due on the first day of July, 1895, and every six months after that date; and it appearing to the court that the defendant, The Pennsylvania Plate Glass Company, executed two hundred and fifty bonds of one thousand dollars each, being bonds to secure which the mortgage under foreclosure herein was executed and delivered, and that said complainant thereupon certified the same and delivered them upon the order of the said Pennsylvania Plate Glass Company, it is further ordered, adjudged and decreed, that it be referred to William R. Blair, Esq., as special master, to ascertain and report, which of said bonds, so certified, as aforesaid, are entitled to the security of said mortgage, the principal sums due and unpaid on said bonds, and the entire aggregate amount of such principal sums; that upon all said bonds which said special master shall report to be entitled to the security of said mortgage, the complainant is entitled to recover not only the amount of the principal of said bonds and the coupons thereon, but also interest upon the said coupons from the maturity thereof until the date of this decree, and interest on the said principal from the date of the maturity thereof until the date of this decree, and interest on the said principal from the date of the maturity of the last coupon, to wit, the first day of July, 1899, to the date of this decree; and it appearing to the court that a very large part of the said mortgaged property has been destroyed by fire, and that the defendant, The Pennsylvania Plate Glass Company, is insolvent, it is further ordered, adjudged and decreed,
21*a* that unless the parties defendant, or some of them, shall, on or before the expiration of twenty days from the entry of this decree, pay the complainant its costs in this cause to be taxed and its compensation as trustee, with its counsel fees and other expenses and other disbursements as the same may be fixed by this court, and the entire sum due for principal and interest, and interest on unpaid coupons up to the date of this decree, with interest thereon from the date hereof, then all the said mortgaged premises and property remaining after said fire, subject only to such easement or rights therein as the said Pennsylvania Railroad Company may have acquired, or may

hereafter acquire by virtue of the aforesaid taking and condemnation proceedings, shall be sold as an entirety, and without an appraisement or right of redemption, by William R. Blair, special master, at public auction to the highest bidder therefor, after notice published, for not less than thirty-five thousand ($35,000) dollars; that the fund to arise from the said sale, together with the said three hundred dollars received by the complainant at the time of the release hereinbefore described, shall be applied to the payment of the expenses of the said sale, to the payment of the costs of this suit, to the payment of the compensation of the complainant herein as trustee, and to the payment of the bonds and coupons of the defendant, The Pennsylvania Plate Glass Company, secured by the mortgage foreclosed hereby, with interest thereon, or if the fund be not sufficient to pay the same, then to the payment of the same *pro rata;* that the defendants, W. L. Kann and The Penn Plate Glass Company, and the plaintiff, The Farmers' Loan & Trust Company, be and they are hereby authorized and directed to execute and deliver, under the direction of the special master making such sale, conveyances executed by them respectively by way of confirmation and further assurance of title to the said purchaser or purchasers, his, its, or their assigns, of
22*a* all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, and wherever located, hereby, directed to be sold by the said special master, and that the form of said conveyance, and the mode of execution thereof shall be settled and approved by the court or a judge thereof, if any question should arise as to the form and sufficiency thereof; and that such conveyances shall be delivered to said purchaser or purchasers, his, its, or their assigns, contemporaneously with the deed or deeds of the said special master; that the said complainant as trustee under said mortgage has, and is entitled to, an equitable first lien upon all the insurance moneys collected by Emanuel Wertheimer as receiver thereof; that the said Wertheimer, as such receiver, shall pay, without further order, out of the said insurance moneys, all the costs, charges and expenses of this suit under the supplemental bill herein; and it is further ordered, adjudged and decreed, that in case there shall be any deficiency upon the amount of the entire mortgage debt, as fixed in the manner hereinbefore specified, with interest thereon from the date hereof, after making the payment hereinbefore provided, all damages and moneys which may be due and be paid from and by said Pennsylvania Railroad Company by virtue of the said taking and condemnation of a part of the mortgaged property as hereinbefore recited, shall be applied to the payment of the costs, expenses and charges of the complainant incurred in the said condemnation proceedings, or in any other proceedings taken for the purpose of collecting such damages, including its own compensation and a reasonable compensation for its counsel for their services in said condemnation, or other proceedings, as the same may be fixed; and to the payment of such deficiency on the entire mortgage debt, with interest thereon, in full, if the said damages and moneys are sufficient, and if they are not sufficient, then to the payment of the same *pro rata;* and the defendants, the

23*a* said Pennsylvania Plate Glass Company and W. L. Kann, are hereby ordered and directed to pay to the complainant herein, without further order of this court, such amount of the said damages arising from said condemnation of said mortgaged premises and property which may be paid to them, or either of them, as may be necessary to pay said costs, expenses and compensation, and, any deficiency which may remain upon said entire mortgage debt, with interest, as aforesaid; if after making the above payments there shall remain any surplus of the said damages and moneys so to be collected from said railroad company, the same shall be paid to the Penn Plate Glass Company.

1899, August 1. Order canceling the bond of the Manhattan Life Insurance Company and directing delivery of same to said company with receipt of att'ys of said company therefor filed.

1899, August 1. Petition for appeal with order thereon allowing appeal and directing that a bond in $1,000 be filed with security to be approved by the clerk filed.

1899, August 2. Bond in the sum of one thousand dollars approved and filed.

1899, August 3. Stipulation of counsel *in re* appeal filed.

1899, August 9. Citation awarded and issued.

1899, August 11. Citation served upon J. S. & E. G. Ferguson, Esqs.

1 In the United States Circuit Court, Western District of Pennsylvania, November Term, 1896. In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
*vs.*
THE PENNSYLVANIA PLATE GLASS COMPANY, THE PENN Plate Glass Company, and Wm. L. Kann. } No. 6.

*Docket Entries.*

Among the rolls, records and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania at No. 6, Nov. term of 1896, in equity, may be found the following words and figures, to wit:

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation Duly Created by and under the Laws of the State of New York and a Citizen of the State of New York,
*vs.*
THE PENNSYLVANIA PLATE GLASS COMPANY, a Corporation Duly Created and Existing under the Laws of the State of Pennsylvania and a Citizen of said State; The Penn Plate Glass Company, a Corporation Duly Created and Existing under the Laws of the State of Pennsylvania and a Citizen of said State, and William L. Kann, a Citizen of the State of Pennsylvania.

2 Bill filed July 8, 1896. Same day subpœna issued returnable first Monday of August next. Same day motion for

and order fixing time for hearing motion for the appointment of a receiver and motion for a preliminary injunction filed.

1896, July 10. Aff'ts of Jos. Garrison *et al.* and Whittlesey D. Searls on part of plaintiff filed.

1896, July 10. Subpœna returned served July 8, 1896, on the Pennsylvania Plate Glass Company by giving a true and attested copy thereof to Phillip Semmer, president of said defendant company, at his office in the city of Pittsburg; also served on said defendant at same time notice of hearing of motion for preliminary injunction by giving a copy of order to its said president. Same day served writ and like notice on Penn Plate Glass Co. by giving a true and attested copy to William L. Kann, president of said defendant company, at its office in the city of Pittsburg, giving him also a copy of said motion. Same day served writ and notice on William L. Kann by giving him a true and attested copy of said order at his office in the city of Pittsburg. Mar. fees, $9.00.

1896, July 10. Hearing of motion for appointment of receiver, and motion for injunction adjourned to July 20, 1896.

1896, July 20. Motion for receiver argued. *C. A. V.* Same day exemplification of record of petition for order of sale. Decree of sale and return and confirmation of sale filed. Same day aff'ts of Francis T. Junkin, Wm. L. Kann, Emanuel Wertheimer and Julius Dreyfus filed.

1896, July 24. Aff't of J. W. Stoner filed. Insurance contract filed.

1896, Sept. 7. Order denying motion for the appointment of receiver filed.

Same day order extending time one week for filing plea, answer, or demurrer filed.

3 1896, Sept. 14. Joint and several answer of Penn Plate Glass Co. and W. L. Kann filed. Demurrer of Penn Plate Glass Co. filed, and demurrer of W. L. Kann filed.

1896, Oct. 28. Complainant's exceptions to the joint and several answer of Penn Plate Glass Co. and W. L. Kann filed.

1897, Jan. 8. Order filed fixing Jan. 16, 1897, for hearing arguments on the demurrer and complainant's motion for reference to a master to pass on exception to answer filed.

1897, Jan. 16. Demurrers and exceptions to answers argued *C. A. V.* 1897, March 1, opinion of the court overruling complainant's exceptions filed, and order filed overruling demurrers. 1897, Mar. 31st, notice of taking testimony on part of complainant with acceptance of service of same filed. 1897, April 5th, replication filed. 1897, April 19th, testimony on part of complainant taken before T. F. Daniels, New York, received and filed. 1897, Dec. 9th, order appointing H. D. Gamble, special examiner on part of defendants filed.

1898, Feb'y 10th. Testimony and exhibits on part of defendants taken before H. D. Gamble, examiner, filed.

*Bill of Complaint.*

To the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, in equity sitting:

The Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office and place of abode in the city of New York, brings this, its bill of complaint, against the Pennsylvania Plate Glass Company, a corporation duly created and existing under the laws of the State of Pennsylvania, a citizen of the State of Pennsylvania, and having its principal office and place of abode in the city of Irwin, county of Westmore-
4 land, and State of Pennsylvania, and against the Penn Plate Glass Company, a corporation duly created and existing under the laws of the State of Pennsylvania, a citizen of the State of Pennsylvania, and having its principal office and place of abode in the city of Irwin, county of Westmoreland and State of Pennsylvania, and against William L. Kann, a citizen of the State of Pennsylvania, residing in said city of Irwin, in said State.

And thereupon your orator complains and says:

I. Your orator is a corporation, bearing the corporate name of the Farmers' Loan and Trust Company, duly created under the laws of the State of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

II. The defendant, The Pennsylvania Plate Glass Company (hereinafter called the mortgage company), is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, for the purpose of constructing, building, owning and operating plate-glass works in the city of Irwin in said State; the defendant, The Penn Plate Glass Company, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, for the purpose of constructing, owning and operating plate-glass works in said city of Irwin in said State; and the defendant, William L. Kahn, is a citizen of the State of Pennsylvania.

III. The said defendant, The Mortgagor Company, being thereunto by law duly authorized, did, on or about the first day of January, 1891, execute and issue its certain first-mortgage bonds, dated that day, and numbered from 1 to 250 consecutively, being for the sums respectively of one thousand dollars each, said bonds aggre-
5 gating in all the sum of two hundred and fifty thousand dollars of principal, payable in United States gold coin, on the first day of January in the year 1901, and bearing interest from the first day of January, 1891, at the rate of six per cent. per annum, payable semi-annually, in like gold coin, at the office of your orator in the city of New York, on the first days of July and January in each and every year, on the presentation and surrender of certain

annexed coupons as they severally matured. Upon each of said bonds there was a certificate, made by your orator, stating that said bond was one of a series of bonds referred to in the mortgage therein mentioned, being the mortgage hereinafter described; all of which by the said bonds and each of them, and the said certificates thereon, to which your orator, for greater certainty, refers, will more fully and at large appear.

IV. On or about the said first day of January, 1891, the mortgagor company, to secure the payment of the bonds hereinbefore mentioned, being thereunto by law duly authorized, executed, acknowledged and delivered to your orator, The Farmers' Loan and Trust Company, as trustee, its certain mortgage or deed of trust, and therein thereby conveying and transferring to your orator, as trustee, and to its successor or successors and assigns, forever, all the following property and premises by the following description, to wit: (the words "party of the first part," in said description, referring to the mortgagor company:

"All that certain tract of land, with the buildings and improvements thereon, situate in North Huntington township, county of Westmoreland and State of Pennsylvania, bounded and described as follows: Beginning at a post on the northwest corner of Fourth street and Broadway avenue, in the town of North Irwin; thence by line of said Fourth street north 1 degree 18 minutes east, nine hundred and fifteen (915) feet to a post; thence by land of C. W. Pool north 88 degrees 42 minutes west, five hundred and
6 eighty-six (586) feet to a post; thence by same north 65 degrees 50 minutes west, four hundred and two feet and six inches (402 ft. 6 in.) to a post; thence by same south 2 degrees 57 minutes east, four hundred and seventy-six (476) feet to a public road and line of Swigger's heirs; thence by same south 65 degrees 59 minutes east, one hundred and fifteen (115) feet to a post; thence by same south 23 degrees 10 minutes west, five hundred and twenty-seven (527) feet to a post on line of Broadway avenue; thence by said avenue south 49 degrees 42 minutes east, one hundred and three feet to a post; thence by said avenue south 88 degrees 42 minutes east, nine hundred and thirty-one (931) feet to a post at Fourth street, the place of beginning; containing twenty-one (21) acres, more or less; being a part of tract of land called "Fruit Hill," for which a patent was issued by the Commonwealth of Pennsylvania to William Elliott, dated 2d May, 1788, and part of which land so patented became vested in C. W. Pool by deed from J. L. Ewing *et ux.*, by deed recorded in Westmoreland county aforesaid, in Deed Book 177, page 135, and being the same tract of land which the said C. W. Pool conveyed to Philip Semmer by deed dated the 16th day of June, A. D. 1890, and recorded in said county in Deed Book 184, page 410, and thereafter conveyed by said Philip Semmer to the party of the first part hereto by deed dated the 28th day of August, 1890, and recorded in said county in Deed Book 184, page 408.

"And also, all the right, title and interest of said party of the first part of, in and to and arising from a certain assignment made by

A. C. Boyd and Philip Semmer, as partners composing the firm of A. C. Boyd & Company, to it, the said party of the first part, bearing date August 30, A. D. 1890, wherein and whereby, for and in consideration of one dollar, A. C. Boyd and Company sold, assigned, transferred and set over unto said party of the first part
7 hereto, all their right, title and interest of, in and to certain contracts whereby the Irwin Natural Gas Company for certain valuable considerations contracted and obligated themselves to furnish natural gas in sufficient quantities for the successful operation of a plate-glass plant, having a capacity for three twenty-pot furnaces with the necessary annealing ovens and appliances, and all other uses necessary for the proper operation of said plant for and during the term of ten years from the 16th day of June, A. D. 1890, subject to the rules and regulations of said Irwin Natural Gas Company, the said plate-glass plant above referred being situate on the above-described premises of the party of the first part.

"And also, all of the right, title and interest of the party of the first part of, in and to and arising from a certain contract now held and owned by it through mesne assignments made between C. W. Pool and Philip Semmer, bearing date the 16th day of June, A. D. 1890, and wherein and whereby said C. W. Pool agreed for the sum of one dollar per annum to deliver at the property line of the premises as above set forth a sufficient quantity of water to supply all the needs of the plate-glass plant to be erected thereon, for a period of three years from the 16th day of June, A. D. 1890, subject to the rules and regulations of the Irwin Water Company; said plant referred to now being erected by party of the first part.

"And also, all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises.

"Together with all and singular the tenements, heredi-ments and appurtenances belonging to the said above-described premises, or thereunto in anywise appertaining, and the reversions, remainders, income, rents, issues and profits thereof, and also all the estate, right, title, interest, property, claim and demand whatsoever, as
8 well in law as in equity, of the said party of the first part, of, in and to the said premises and every part thereof, with the appurtenances.

"To have and to hold, all and singular, the premises and property, rights and franchises, whether real, or personal, or mixed, hereby conveyed, or intended so to be, with the appurtenances, unto the said The Farmers' Loan and Trust Company, the party of the second part, as trustee, and its successor or successors and assigns."

V. In and by the said mortgage or deed of trust it was among other things provided, that in case default should be made in the payment of any instalment of interest on any of the aforesaid bonds, according to their tenor, and of any coupons accompanying the same, or in the performance of any covenant, agreement or stipulation therein contained and thereby required to be kept and performed by the said mortgagor company, and if such default should continue

for the period of six months after demand made in writing by your orator upon the said mortgagor company for the payment of the said moneys or the performance of the said covenant, it should be lawful for your orator, or its successor or successors, to enter into or upon the premises thereby conveyed, and operate and manage the same, and collect and receive the income therefrom, and after deducting all the expenses of such operation and the payment of taxes, assessments, charges or liens prior to the lien of said mortgage, as well as a just compensation for its own services, to apply the moneys arising as aforesaid to the payment of the interest on the bonds thereby secured in the order in which the same should have become due, rateably; and if, after paying all such interest, any surplus should remain, such surplus and the property and premises aforesaid should be forthwith paid and surrendered to said mortgagor company, its successors or assigns.

VI. In and by the said mortgage or deed of trust it was also among other things provided, that in case default should be
9 made as aforesaid, or in case default should be made in the payment of the principal of any of said bonds, and in case such default should continue for a period of six months after demand made in writing by your orator for the payment of the said moneys, or the performance of the covenant or covenants, it should also be lawful for your orator, and upon receiving a written requisition signed by a majority in value of the bonds secured by said mortgage then outstanding, with proper indemnification against costs, compensation and expenses, it should be the duty of your orator, or its successor or successors, after entry as aforesaid, or other entry, or without entry, personally, or by its attorney or agent, to sell and dispose of all property thereby conveyed, as an entirety, or such part or parts of the same as should be necessary from time to time, at public auction, in the town of Irwin aforesaid, at such time or times as your orator might appoint, having first given notice of such sale as therein directed, and upon the making of such sale, and upon the receipt of the purchase price of the property sold, to make and deliver to the purchaser or purchasers a good and sufficient deed in the law conveying the same, and that such sale or sales should be a perpetual bar, at law and in equity, against the said mortgagor company and all other persons or corporations; and after deducting from the proceeds of such sale a just allowance for all disbursements and expenses of or incident to such sale, including attorneys' and counsel fees and all other expenses, advances or liabilities which should have been made or incurred by your orator in operating the said plate-glass works, or in managing its business while in possession, and all payments which should have been made by it for taxes or assessments and for charges or liens prior to the lien of the said mortgage upon the said premises or any part thereof, to apply the said proceeds to the payment of the principal and accrued interest of such of the bonds thereby secured as should then be outstanding and unpaid, whether or not the same should have become previously due, without discrimination, rateably, to
10 the persons or corporations which should then be the holders of said bonds and of the coupons representing such accrued

interest, to the aggregate amount of the said unpaid principal and accrued interest; and if, after the satisfaction of the principal and accrued interest of all the said bonds then outstanding and unpaid, a surplus of the said proceeds should remain, to pay over the same to the said mortgagor company, or to whomsoever should be lawfully or equitable entitled to receive the same, or as some court of competent jurisdiction should direct.

VII. In and by the said mortgage or deed of trust it was also among other things provided, that in case default should be made as aforesaid, and should continue as aforesaid, it should also be lawful, and it should be the duty of your orator, or its successor or successors in the trust, upon receiving a written requisition signed by the holders of one-third in value of the bonds thereby secured and then outstanding, after entry as aforesaid, or other entry, or, without entry, to commence and prosecute such actions, suits or proceedings at law or in equity as should be necessary to obtain the sale of the said premises by and under judicial authority, and to bar and foreclose the equity of redemption of the mortgagor company, its successors and assigns, and of all persons claiming under them or any of them in and to the said premises thereby conveyed or intended so to be, and every part and parcel thereof.

VIII. In and by the said mortgage or deed of trust it was also among other things provided, that in case default should be made in the payment of the semi-annual installments of interest of any of the said bonds, according to the tenor of the same and the coupons accompanying the same, and in case such default should continue for a period of six months after demand by your orator in writing for the payment of the said moneys, the principal of the bonds secured thereby and the said accrued interest should, at the election of your orator, become immediately collectible from
11 and out of the said mortgaged premises, anything in the said bonds or therein contained to the contrary notwithstanding; and that your orator might thereupon immediately proceed to cause the said premises to be subjected to the payment of the said debt, in like manner as thereinbefore provided.

IX. In and by the said mortgage or deed of trust it was also among other things provided, that your orator should only be responsible for reasonable diligence in the performance of the trust, and should not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable care and discretion; that your orator should be entitled to be reimbursed all proper outlays of every sort and description by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it might at any time perform in the discharge of the same; and that all such fees, commissions, compensation and disbursements should constitute a lien on the mortgaged property and premises.

X. The said mortgage or deed of trust was and is the proper act and deed of the mortgagor company, by it authorized, made and delivered in all respects in conformity with law; and the same was duly recorded in the office of the recorder of deeds of the county of

Westmoreland, in the State of Pennsylvania, in Mortgage Book No. 43, at page 1, etc., on January 12, 1891; and the same is a valid conveyance for the purposes therein stated. The trusts therein and thereby created were duly accepted by your orator before the recording of the said mortgage or deed of trust as aforesaid. Your orator attaches to this, its bill of complaint, as "Exhibit A," a copy of said mortgage, and referring thereto, prays that the same may be taken as part hereof.

XI. Under and by virtue of the provisions of said mortgage or deed of trust, your orator, being thereunto duly requested,
12 certified, in the form set forth therein, all of the bonds mentioned and described in the said mortgage or deed of trust, and to secure which the same was executed and delivered as aforesaid; and all of said bonds, aggregating the sum of two hundred and fifty thousand dollars of principal, are outstanding and existing obligations on the part of the mortgagor company.

XII. Default has been made by the mortgagor company in the payment on the first day of July, 1895, of the coupon interest due on that day on all the said bonds which have been issued and are outstanding as aforesaid, and all interest on all the said bonds from that day remains overdue and unpaid, including the interest due on that day as aforesaid. Demand in writing, in accordance with the terms of said mortgage, has been made of the mortgagor company and of the defendants The Penn Plate Glass Window Company and William L. Kann for the payment of the interest on some of the said bonds which fell due as aforesaid, and payment of the same has been refused, and such default has continued for a period of six months and more since such demand was made, and still continues. Default has also been made by the mortgagor company in the payment on the first day of January, 1896, of the coupon interest due on that day on all the said bonds which have been issued and are outstanding as aforesaid, and all interest on all the said bonds from that day remains overdue and unpaid, including the interest due on that day as aforesaid. Demand in writing, in accordance with the terms of said mortgage, has been duly made of the mortgagor company and of the defendants The Penn Plate Glass Company and William L. Kahn for the payment of some interest on some of the said bonds which fell due as aforesaid, and payment of the same has been refused. Default has also been made by the mortgagor company in the payment on the first day of July, 1896, of the coupon interest due on that day on all the said bonds
13 which have been issued and are outstanding as aforesaid, and all interest on all the said bonds from that day remains overdue and unpaid, including the interest due on that day as aforesaid. Demand has been duly made at the office of the Farmers' Loan and Trust Company, in accordance with the terms of said mortgage, for the payment of the interest on some of the said bonds which fell due as aforesaid, and payment of the same has been refused.

The said default in the payment of the semi-annual installments of interest of the first day of July, 1895, and the first day of Jan-

uary, 1896, have both continued for a period of six months and more after demand made by said trustee in writing for the payment of said moneys, and your orator has elected that the principal of the said bonds secured by said mortgage and the said accrued interest thereon shall be, and the same has become immediately collectible from and out of the said mortgaged premises.

XIII. The holders and owners of a very large number of said bonds have requested, in writing, your orator to commence this suit and to foreclose the said mortgage or deed of trust. The holders of the bonds secured by the said mortgage or deed of trust are numerous, and the names and residences of many of such holders are unknown to your orator, and your orator cannot make them parties hereto.

XIV. Your orator is informed and believes, and therefore alleges, that on or about the — day of ——, 189–, the defendant, the mortgagor company, conveyed all its property, real, personal and mixed, to the defendant, William L. Kann, and that thereafter the same was by the said William L. Kann conveyed to the defendant, The Penn Plate Glass Company. Said conveyances were made, however, subject to the mortgage above described and the bonds issued thereunder and secured thereby and the interest coupons thereto, which mortgage, bonds and coupons the defendants, the said William L. Kann and The Penn Plate Glass Company assumed and agreed to pay according to the tenor thereof.

14 XV. Your orator is informed and believes that the mortgagor company is insolvent, and wholly unable to pay its debts and obligations, and that the property and premises covered by the said mortgage or deed of trust so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, namely, the holders of the bonds secured by the said mortgage or deed of trust so made to your orator as aforesaid.

XVI. By reason of the matters and things hereinbefore alleged, there is due to your orator, as trustee under the aforesaid mortgage or deed of trust, the amount of the principal sum secured by each and every of the said bonds that have been issued, together with the coupon interest which fell due thereon and on each of the said bonds on the first day of July, 1895, and also each and every instalment which has fallen due on each and all of the said bonds since that day, with interest on each instalment of the said coupon interest from the time when the same fell due as aforesaid.

No proceedings have been had, at law or in equity, for the collection of said mortgage debt, or any part thereof, save only this suit.

XVII. In consequence of the embarrassed condition of the financial affairs of the mortgagor company, and on account of the many difficulties which are manifest upon and from the allegations hereinbefore contained, involved in the execution of your orator's said

trust, it is impossible for your orator, as trustee under the said mortgage or deed of trust, to execute its said trust in the way and manner specified and provided in and by the said mortgage or deed of trust, without the aid or interposition of this honorable court in chancery sitting; nor can the said trust be executed,
15 as your orator is advised and charges, and the right of all the parties interested as ascertained and fully protected in the premises otherwise than by a judicial sale of the mortgaged premises, and of all the franchises, property, premises and appurtenances covered by the said mortgage or deed of trust. Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises and property of the mortgagor company, of whatever name, nature and description, including all its money on hand, and the earnings of the same, be placed in the hands and under the control of a receiver, to be appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable: to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated; that your orator may be placed in possession of the mortgage premises personally, or that a receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the said defendant, The Pennsylvania Plate Glass Company, with power and authority to operate said plate-glass works and carry on the business of said mortgagor com-
16 pany under the protection of this court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to the said mortgagor company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever; that an injunction may issue out of this court, restraining and enjoining the said mortgagor company and all and every its agents and servants, from in any way interfering with the possession or control of the property of said mortgagor company under the control of said receiver, and from selling, transferring, conveying, leasing, or otherwise disposing of or encumbering any of the property, rights or franchise of the said mortgagor company; that all the rights and franchise, and all the property, real and personal, of the said mortgagor company may be

declared subject to the lien of the said mortgage or deed of trust; that an account may be taken of the amounts due upon the bonds secured by the said mortgage or deed of trust and now outstanding, with interest thereon; that the amount so found due may be found to be the first lien on all the property of the said mortgagor company, and upon all the property heretofore conveyed, assigned or transferred by said mortgagor company as aforesaid, according to the terms of the said mortgage or deed of trust; that the said mortgagor company may be decreed to pay the amount so found to be due upon said bonds and the coupons thereto, for interest or principal or both; that in default thereof all the property and franchises of the said mortgagor company and all the property and franchises by said mortgagor company heretofore conveyed to said defendant W. L. Kann, or by said Kann conveyed to said defendant, The Penn Plate Glass Company, may be sold under a decree of this court and according to law and the practice of this court, to satisfy the amount so found due; that out of the proceeds of said sale, or the net earnings while in the hands of said receiver so to be ap-
17 pointed, there may be paid, first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the court, and that the residue thereof may be applied to the payment of the amount due upon the said mortgage bonds and the coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in the said property and premises; and that any deficiency on such sale may be entered in this cause as a judgment against the said mortgagor company; and that your orator may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity; may it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants, The Pennsylvania Plate Glass Company, The Penn Plate Glass Company, W. L. Kann, to appear and answer this bill.

And your orator will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON, *President.*

Attest: E. S. MARSTON, *Secretary.*

HERBERT L. FILULE, *Of Counsel.*
T——, McCLURE & ROLSTON,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, }
*Southern District of New York,* } ss:

Roswell G. Rolston, being duly sworn, deposes and says, that he is the president of The Farmers' Loan and Trust Company, the com-

plainant above named, and has been such president for a number of years past; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he
18 believes it to be true; that the verification is not made by the complainant because it is a corporation; and that his knowledge is derived from having taken part in the transactions spoken of and from statements made to him, and from examination of the papers, and the same constitute his ground of belief; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by his authority.

R. G. ROLSTON.

Sworn to before me this 6th day of July, 1896.

W. B. CARDOZO,

[SEAL.] *Notary Public, No.* 18, *New York County.*

EXHIBIT "A."

This indenture, made this first day of January, one thousand eight hundred and ninety-one, between the Pennsylvania Plate Glass Company, of Irwin, Westmoreland county, State of Pennsylvania, a corporation duly created and existing under the laws of the State of Pennsylvania, party of the first part, and the Farmers' Loan and Trust Company, a corporation created by and existing under the laws of the State of New York, located in the city of New York, party of the second part, witnesseth:

That whereas, said party of the first part, by its board of directors, have deemed it advisable to increase its indebtedness by the issue of bonds to the amount of two hundred and fifty thousand dollars, to be used towards the payment of liabilities incurred in the erection of a plate-glass works now being erected on land of the company as hereinafter set forth; and

Whereas, a majority of the stockholders of the said party of the first part have consented to such increase of indebtedness in the manner and form as provided by the statutes of the State of Pennsylvania; and

Whereas, the board of directors of said party of the first
19 part, at a regular session thereof, by a resolution duly ordained and passed, authorized and directed the president and secretary of said company to prepare and execute a series of bonds and accompanying mortgage in conformity with the consent of the stockholders of said company, and at the same time appointed a committee to superintend the issue of same and to decide on the form thereof and the trustee of said mortgage; and

Whereas, said committee have determined on the issue of a series of two hundred and fifty (250) bonds, of the denomination of one thousand dollars each, numbered from one to two hundred and fifty, consecutively, dated January 1, 1891, signed by the president and authenticated by the secretary of said party of the first part, with

the corporate seal attached thereto, and payable in gold coin of the United States of or equivalent to the present standard of weight and fineness, at the office of the Farmers' Loan and Trust Company, said company having been duly selected to act as trustee, the party of the second part, in the city of New York, ten years after date, with the coupons or interests warrants thereto attached, representing the interest to accrue thereon at the rate of six per cent. per annum, payable semi-annually on the first days of July and January in each year in gold coin, at said office of the party of the second part in the city of New York, upon the presentation and surrender of the coupons representing the several installments of interest as they respectively mature and by reference to the terms of the mortgage, to limit the remedy of the holder in case of default in the payment of principal or interest to the subjection of the property and premises to be conveyed to the payment thereof; and

Whereas, the bonds so proposed to be issued by the party of the first part, the coupons or interest warrants accompanying the same, and the trustee's certificate to be indorsed on said bonds, are substantially of the following form, that is to say:

20 (*Form of Bond.*)

UNITED STATES OF AMERICA, *State of Pennsylvania.*

No. —. $1,000. No. —.

*Pennsylvania Plate Glass Company 6 % First-mortgage Gold Bond.*

Know all men by these presents, that the Pennsylvania Plate Glass Company is indebted and hereby promises to pay to the Farmers' Loan and Trust Company of the City of New York or bearer, one thousand dollars in the gold coin of the United States of America of or equivalent to the present standard of weight and fineness, at the office of said Farmers' Loan and Trust Company of New York City on the first day of January, one thousand nine hundred and one, with interest from the first day of January, one thousand eight hundred and ninety-one, at the rate of six per centum per annum, payable semi-annually in like gold coin, at the office of said Farmers' Loan and Trust Company, in the city of New York, on the first days of July and January, in each year, on the presentation and surrender of the annexed coupons as they severally mature.

In the case of default in the payment of the principal or any of the said interest in accordance with the tenor hereof, the said principal and interest may become collectible in the manner and with the effect specified and set forth in the deed of trust or mortgage hereinafter mentioned.

This bond is one of the series of two hundred and fifty bonds of like amount, tenor and date, amounting in the aggregate to the sum of two hundred and fifty thousand dollars, and numbered from one to two hundred and fifty consecutively, the payment of the whole series of bonds, with the interest thereof, being equally secured by a

certain deed of trust or mortgage, bearing even date here-
21 with, conveying the property and franchises of the company, more particularly described therein, unto the Farmers' Loan and Trust Company, to which reference is hereby made, for the terms and conditions upon which this bond is issued and for the rights and remedies of the holder hereof.

This bond shall not become obligatory until it shall have been authenticated by the certificate of the Farmers' Loan and Trust Company endorsed hereon.

In witness whereof, the Pennsylvania Plate Glass Company has caused its corporate seal to be hereto affixed and the same to be signed by its president and attested by its secretary, this first day of January, A. D. 1891.

PENNSYLVANIA PLATE GLASS COMPANY,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

(*Coupon.*)

Pennsylvania Plate Glass Company will pay the bearer hereof on the first day of —— thirty dollars in gold coin, at the office of the Farmers' Loan and Trust Company in New York city, being for six months' interest on its bond No. —.

—— ——, *Treasurer.*

The Farmers' Loan and Trust Company hereby certifies that this bond is one of the series referred to and secured in the within-mentioned mortgage or deed of trust.

THE FARMERS' LOAN AND TRUST COMPANY,
By —— ——, *Vice-President.*

Now therefore, this indenture witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to it paid, the receipt whereof is hereby acknowledged, and in order to better secure the payment of the principal and interest of said bonds
as the same shall become due and payable, according to the
22 tenor and effect of said bonds and of the coupons or interest warrants, accompanying the same, hath granted, bargained and sold and by these presents doth grant, bargain, sell, release, convey and confirm unto said party of the second part hereto, and unto its successor or successors and assigns forever, all that certain tract of land, with the buildings and improvements thereon, situate in North Huntington township, county of Westmoreland and State of Pennsylvania, bounded and described as follows: Beginning at a post on the northwest corner of Fourth street and Broadway avenue, in the town of North Irwin; thence by line of said Fourth street north 1 degree 18 minutes east, nine hundred and fifteen (915) feet to a post, thence by land of C. W. Pool north 88 degrees 42 minutes west, five hundred and eighty-six (586) feet to a post; thence by

same north 65 degrees 50 minutes west, four hundred and two feet and six inches (402 ft. 6 in.) to a post; thence by same south 2 degrees 67 minutes east, four hundred and seventy-six (476) feet to a public road and line of Swigger's heirs; thence by same south 65 degrees 50 minutes east, one hundred and fifteen (115) feet to a post; thence by same south 23 degrees 10 minutes west, five hundred and twenty-seven (527) feet to a post on line of Broadway avenue; thence by said avenue south 49 degrees 42 minutes east, one hundred and three feet to a post; thence by said avenue south 88 degrees 42 minutes east, nine hundred and thirty-one (931) feet to a post at Fourth street, the place of beginning, containing twenty-one (21) acres, more or less.

Being a part of a tract of land called "Fruit Hill," for which a patent was issued by the Commonwealth of Pennsylvania to William Elliott, dated 2d May, 1788, and part of which land so patented became vested in C. W. Pool by deed from J. L. Ewing *et ux.*, by deed recorded in Westmoreland county aforesaid, in Deed Book 177, page 135, and being the same tract of land which the said C. W. Pool conveyed to Philip Semmer by deed dated the 16th day
23 of June, A. D. 1890, and recorded in said county in Deed Book 184, page 410, and thereafter conveyed by said Phillip Semmer to the party of the first part hereto by deed dated the 28th day of August, 1890, and recorded in said county in Deed Book 184, page 408.

And also all the right, title and interest of said party of the first part of, in and to and arising from a certain assignment made by A. C. Boyd and Phillip Semmer, as partners composing the firm of A. C. Boyd and Company, to it, the said party of the first part, bearing date August 30, A. D. 1890, wherein and whereby, for and in consideration of one dollar, said A. C. Boyd and Company sold, assigned, transferred and set over unto said party of the first part hereto, all their right, title and interest of, in and to certain contracts whereby the Irwin Natural Gas Company for certain valuable considerations contracted and obligated themselves to furnish natural gas in sufficient quantities for the successful operation of a plate-glass plant, having a capacity of three twenty-pot furnaces with the necessary annealing ovens and appliances, and all other uses necessary for the proper operation of said plant for and during the term of ten years from the 16th day of June, A. D. 1890, subject to the rules and regulations of said Irwin Natural Gas Company, the said plate-glass plant above referred to being situate on the above-described premises of the party of the first part.

And also all of the right, title and interest of the party of the first part of, in and to and arising from a certain contract now held and owned by it through mesne assignments made between C. W. Pool and Phillip Semmer, bearing date the 16th day of June, A. D. 1890, wherein and whereby said C. W. Pool agreed for the sum of one dollar per annum to deliver at the property line of the premises as above set forth, a sufficient quantity of water to supply all the needs of the plate-glass plant to be erected thereon, for a period of three years from

the 16th day of June, A. D. 1890, subject to the rules and
24 regulations of the Irwin Water Company. Said plant referred to now being erected by party of the first part.

And also all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises.

Together with all and singular the tenements, hereditaments and appurtenances belonging to the said above-described premises, or thereunto in anywise appertaining, and the reversions, remainders, income, rents, issues and profits thereof, and also, all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the said premises and every part thereof with the appurtenances.

To have and to hold, all and singular, the premises and property, rights and franchises, whether real, or personal, or mixed, hereby conveyed, or intended so to be, with the appurtenances, unto the said The Farmers' Loan and Trust Company, the party of the second part, as trustee, and its successor, or successors and assigns.

In trust nevertheless, for the equal and *pro rata* benefit and security of the several persons or corporations who may be or become holders of any of the bonds hereby secured, without any preference or priority of one bond over another or others, by reason of priority in the time of issue or negotiation thereof, or otherwise, and for the uses and purposes, and upon and under the terms and stipulations hereinafter expressed and contained, that is to say:

ARTICLE FIRST. Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds thereby secured, or some of them, or in the performance of some one or more of the covenants, stipulations or agreements herein required by it to be kept, performed or done, the said
25 party of the first part shall be suffered and permitted to possess, manage, operate and enjoy the said hereinbefore mentioned and described plate-glass works and premises, with the appurtenances, and to take and use the incomes, rents, issues and profits thereof, and to dispose of the same in any manner not inconsistent with these presents; and the party of the first part shall also have the right, from time to time, in its discretion, to dispose of such portion or portions of the plant, machinery, implements, furniture and fixtures at any time, held or acquired for use in connection with the said plate-glass works, as may become unfit for use, replacing the same by new, which shall become subject to the operation of these presents.

ARTICLE SECOND. In case default shall be made in the payment of any installment of interest on any of the aforesaid bonds, according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement or stipulation herein contained, and hereby required to be kept and performed by the said party of the first part, and if such default should continue for the period of six months after demand, made in writing by the said trustees upon the said party of the first

part, for the payment of the said moneys, or the performance of the said covenants, it shall be lawful for the said trustee, the party of the second part, or its successor or successors, personally, or by its attorneys or agents, to enter into or upon all and singular, the premises hereby conveyed, or intended so to be, and each and every part thereof, and wholly to evade the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said plate glass company and appurtenances, conducting the business thereof, and enjoying the franchises pertaining thereto, making from time to time all such repairs and replacements, and such useful alterations, additions and improvements, as may seem to be necessary and judicious to carry
26 on the business of said party of the first part and to collect and receive all incomes, rents, issues and profits of the same and every part thereof, and after deducting all the expenses of operating and of conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges or liens, prior to the lien of these presents, upon the said premises or any part thereof, as well as a just compensation for its own services, to apply the moneys arising as aforesaid to the payment of the interest on the bonds hereby secured, in the order in which the same shall have become due, ratably, to the person and corporations, who shall be the holders of the coupons representing such interests, and if after paying all interest, which shall have become due, a surplus shall remain, such surplus, and the property and premises hereby conveyed, shall be forthwith paid and surrendered to the said party of the first part, its successors or assigns, and the said mortgage premises shall be thereafter possessed and held by the said party of the first part, its successors and assigns, subject to the lien of this mortgage, and to the right of the said trustee to take possession, in case of other default, in like manner, and with the like effect, as hereinbefore specified and provided.

ARTICLE THIRD. In case default shall be made, as aforesaid, or in case default shall be made in payment of the principal of any of the said bonds, or any part thereof, and in case such default shall continue for the period of six months after demand, made in writing, by the said trustee, for the payment of the said moneys, or the performance of the covenant or covenants, it shall be also lawful for the said trustee, and upon receiving a written requisition, signed by a majority in value of the bonds secured hereby, then outstanding, with proper indemnification against costs, compensation and expenses, it shall be the duty of the said trustee, or its successor
27 or successors, after entry as aforesaid, or other entry, or without entry, personally, or by its attorney or agent, to sell and dispose of all and singular the premises, franchises and contracts hereby conveyed and assigned or intended so to be, as an entirety, or such part or parts of the same as shall be necessary, from time to time, at public auction, in the town of Irwin aforesaid, at such time or times as the trustee may appoint, having first given notice of the

time and place of such sale by advertisement containing a brief general description of the property to be sold, to be published at least once a week for four consecutive weeks in one newspaper published in the city of New York, in the State of New York, in one newspaper published in the town of Irwin, in the State of Pennsylvania, and one newspaper published in the city of Pittsburg, in the State of Pennsylvania; to adjourn such sale from time to time in its discretion, and after such adjournment or adjournments to make the sale at the time and place to which the same shall be so adjourned; and at and upon the making of such sale, and upon the receipt of the purchase price of the property sold, to make and deliver to the purchaser or purchasers, a good and sufficient deed in the law conveying the same.

Such sale or sales so to be made, shall be a perpetual bar both at law and in equity against the party of the first part, and all other persons or corporations lawfully claiming or to claim the premises so sold, or any part or parcel thereof by, through, from or under it; and after deducting from the proceeds of any such sale a just allowance for all disbursements and expenses of or incident to such sale, including attorneys' and counsel fees, and all other expenses, advances or liabilities which have been made or incurred by the said trustee, in operating or maintaining the said plate-glass works, or in managing its business while in possession, and all payments which shall have been made by it for taxes or assessments, or for charges or liens prior to the lien of these presents, upon the said premises or any part thereof, to apply the said proceeds to
28 the payment of the principal and accrued interest of such of the bonds hereby secured, as shall then be outstanding, and unpaid, whether or not the same shall have become previously due, without discrimination, ratably, to the persons or corporations who shall then be the holders of said bonds, and of the coupons representing such accrued interest to the aggregate amount of the said unpaid principal and accrued interest; and if, after the satisfaction of the principal and accrued interest of all of the said bonds then outstanding and unpaid, a surplus of the said proceeds shall remain, to pay over the same to the said party of the first part, or to whomsoever shall be lawfully or equitably entitled to receive the same, or as some court of competent jurisdiction shall direct.

And it is hereby declared that the receipt or receipts of the said trustee shall be a sufficient discharge to the purchaser or purchasers, at such sale, for the purchase-money, and that neither such purchaser or purchasers, nor his or their heirs, executors, administrators or assigns, shall be liable after the payment thereof to the trustee, and being in possession of such receipt or receipts therefor for the due application of said purchase-money, or any part thereof, nor shall they or any of them be in any manner whatsoever answerable for any loss, misapplication or non-application of such purchase-money, or any part thereof, nor be in any manner obliged to enquire into the necessity, expediency or authority of or for such sale.

And in case default shall be made as aforesaid and shall continue as aforesaid, it shall also be lawful, and it shall be the duty of the

said trustee, and its successor or successors in the said trust, upon receiving a written requisition, signed by the holders of one-third in value of the bonds hereby secured and then outstanding, after entry as aforesaid, or other entry, or without entry, to commence and prosecute such actions, suits or proceedings at law, or in equity, as shall be necessary to obtain the sale of the said premises, by and under judicial authority, and to bar and foreclose the equity
29 of redemption of the said party of the first part, its successors and assigns, and of all persons claiming under them, or any of them, and the said premises hereby conveyed or intended so to be, with the appurtenances, and every part and parcel thereof.

ARTICLE FOURTH. At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustee, or any other power of sale heretofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do, by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of the property be sold, or if it all be sold at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

It being expressly understood and agreed by and between
30 the parties hereto, and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of

sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding.

ARTICLE FIFTH. In case default shall be made in the payment of the semi-annual installments of interest of any of the said bonds, according to the tenor of the said bonds and the coupons accompanying the same, and in case any such default shall continue for a period of six months after demand by said trustee, in writing, for the payment of the said money, the principal of the bonds secured hereby, and the said accrued interest shall, at the election of the said trustee, become immediately collectible from and out of the said mortgaged premises, anything in the said bonds or herein contained to the contrary notwithstanding, and the said trustee may
31 thereupon immediately proceed to cause the said premises to be subjected to the payment of the said debt in like manner as hereinbefore provided.

But a majority in interest of the holders of the principal of said bonds then outstanding and unpaid may, in writing instruct the said trustee to declare the said principal and interest to be so collectible without demand for payment at, upon or after the default, as aforesaid, of the party of the first part to pay the said interest, or any part thereof; or such majority in the interest of the holders of the said bonds may waive the right so to declare on such terms and under such conditions as such majority may deem proper or may annul or reverse such election by the trustee; provided, however, that no such action of the trustee or the holders of the said bonds, shall extend to, or to be taken to affect any subsequent default, or to impair any of the rights or powers hereinbefore mentioned resulting therefrom.

ARTICLE SIXTH. The said party of the first part shall, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee or its successors, execute, acknowledge and deliver all such further deeds and assurances in the law, for the better assuring *such* the said trustee and its successor or successors, in the trust hereby created, upon the trusts herein expressed, the premises, franchises and appurtenances hereinbefore mentioned and conveyed, or intended so to be, and all other property and thing-whatsoever appurtenant thereto, whether now acquired and held, or hereafter to be acquired, as by such trustee, its successor or successors, or their counsel learned in the law, shall be reasonably advised, *are* required.

ARTICLE SEVENTH. The said trustee and its successors shall have full power in their discretion, upon the written request of the said party of the first part, or its successors to convey by way of release or otherwise to the person or persons designated by the party
32 of the first part, or its successors, or to reconvey to the said party of the first part, its successors and assigns, any lands

acquired in any way or held for the purpose of the business of the party of the first part, or the uses connected therewith in connection with its said business, upon security satisfactory to the trustee for the protection of its *cestui que trust.*

ARTICLE EIGHTH. And it is further agreed that whenever and as often as any contingency shall arise in which a meeting of the holders of the bonds hereby secured shall be necessary or expedient, it shall be the duty of the trustee or of the president of the party of the first part, on the written request of the holders of not less than one-fifth in amount of the principal of the bonds then outstanding, stating therein the object of such meeting, to call a meeting of the holding of the then outstanding bonds secured hereby, to be held at some convenient place in the town of Irwin, Pennsylvania, by advertisement in at least two newspapers published in said city of New York, the town of Irwin and the city of Pittsburg, Pennsylvania, such advertisement to be published daily in such newspapers for at least ten successive days immediately preceding the time named for such meeting. In case of the default of such trustee and of the said president to call such meeting, it shall be competent for the holders of one-fifth in amount of the bonds then outstanding to call a meeting in the manner aforesaid; and at any such meeting so called the holders of said bonds may attend in person or by proxy, and it shall be competent for a majority of them to exercise all the powers and privileges conferred upon the bondholders by these presents, or which may otherwise be lawfully exercised or enjoyed by them, provided that the holders of a majority in amount of the principal of the then outstanding bonds, attending either in person or by proxy, shall be necessary to constitute a quorum at such meeting, and that any vote of such meeting effecting or intending to effect any person or corporation, including the parties hereto, or their successors, may by any person or
33 corporation so to be affected, be required to be authenticated by the signatures of the persons so voting.

It is further agreed that in case of the resignation, incapacity or removal of the trustee, a successor or successors may be appointed by the holders of a majority in amount of the principal of the bonds secured hereby, then outstanding, by an instrument in writing signed by them, or by the vote of any meeting called and held as hereinbefore provided, and in case such majority in amount of the holders of the said bonds do not agree upon the appointment of a new trustee, or trustees, then the party of the first part hereto is hereby authorized and empowered to apply, or if it shall neglect or refuse so to do for the period of thirty days after any vacancy shall occur, then the holders of any of the said bonds then outstanding, to the amount of fifty thousand dollars, may, on notice to the party of the first part, or its successors, apply to any court of record, of competent jurisdiction, for the appointment of a new trustee or trustees; and the trustee or trustees so appointed or elected, under any of the provisions hereof, shall, on his or their acceptance of such appointment or election, thereby become invested with all the estate, rights and powers as trustee or trustees hereunder, and shall per-

form the same duties as he or they would have held, possessed or been invested with, or bound or obliged to perform, had he or they been made the party or parties of the second part hereto.

It is further agreed that in case any vacancy shall occur by reason of the resignation, removal, disability, neglect or refusal to act, of the said parties of the second part or either of them, at and upon the happening of such vacancy, and until the appointment of a new trustee or trustees in pursuance of the provisions hereof, C. W. Pool, Esquire, of the State of Pennsylvania, is hereby appointed and shall become the trustee hereunder, and the premises hereby conveyed and the estate hereby granted shall thereupon immediately
34 vest in him, the said C. W. Pool, Esquire, and his successors in the said trust, in the place and stead of the trustee or trustees in respect to whom such vacancy shall exist, with the like effect and with the like powers and duties, to all intents and purposes, as if the said premises had been conveyed to him by these presents.

ARTICLE NINTH. If the said party of the first part shall well and truly pay the principal of the said bonds and every of them, and the interest to accrue thereon, according to the tenor and effect of the said bonds, and of the several coupons accompanying the same, and shall well and truly observe, perform and keep, all and singular, the several covenants, agreements and stipulations herein provided on its part to be observed, performed and kept, according to the true intent and meaning of these presents, then, and in that case, all the estate, right, title and interest of the said party of the second part, its successor or successors, in the trust hereby created, shall cease, determine and become void; otherwise the same shall be and remain in full force and virtue; and at and upon the payment of the said bonds hereby secured and the interest thereon, this indenture shall be discharged by the said parties of the second part, or their successor or successors, by appropriate instrument or instruments, under seal, duly executed and acknowledged.

ARTICLE TENTH. The right of action under this indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this indenture, for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion; but the trustee shall be under no obligation to institute any such suit, or to take any proceedings under this indenture or to enter any
35 appearances or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such

request or demand. The trustee may nevertheless begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such trustee, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for
36 reasonable diligence in the performance of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same; and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property and premises.

In case at any time it shall be necessary and proper for the trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything as such trustee, the certificate of the party of the first part, under its corporate seal, attested by the signature of its president, and the affidavit of one or more directors, shall be conclusive evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

All recitals, statements of fact and representations herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of the same; nor is the party of the second part to be understood as making any representations as to the character, extent or value of the above-described property, or as to the title thereto.

ARTICLE ELEVENTH. The said party of the second part doth hereby accept the trust hereby created.

In witness whereof, the said party of the first part, pursuant to a resolution of its board of directors, hath caused this instrument to be signed by its president and attested by its secretary, and its cor-

porate seal hereunto affixed, and the said The Farmers' Loan
37 and Trust Company, under the direction and authority of its board of directors, hath caused this instrument to be signed by its president and attested by its secretary and its corporate seal hereunto affixed.

PENNSYLVANIA PLATE GLASS COMPANY,
By C. W. POOL, *President.*

Attest: A. LIVINGSTON NORMAN, [SEAL.]
*Secretary.*

THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON, *President.*
Attest: E. S. MARSTON, *Secretary.* [SEAL.]

Sealed and delivered in presence of—as to Pennsylvania Plate Glass Company—
S. E. POOL.

Witness as to the Farmers' Loan and Trust Company:
W. B. CORDOZO.

STATE OF ——, }
*County of* ——, } *ss:*

Be it remembered, that on this — day of ——, anno Domini eighteen hundred and ninety —, before me, a notary public, in and for the said county and State, duly commissioned and qualified, came C. W. Pool, the president of the Pennsylvania Plate Glass Company, and A. Livingston Norman, the secretary of said company, to me personally known to be the persons whose names are subscribed to the foregoing instrument, as the president and secretary of the said company, and severally acknowledged the same as and for the voluntary act and deed of the said Pennsylvania
38 Plate Glass Company, by them severally, voluntarily done and executed for the purposes therein set forth.

And the said A. Livingston Norman being by me duly sworn, did depose and say, that he resides in the county of New York and State of New York, that he is the secretary of the said Pennsylvania Plate Glass Company, that the seal affixed to the foregoing instrument as the seal of said company is the corporate seal thereof; that it was affixed by the order of the board of directors of the said company, and that he signed his name thereto by the like order of the said board.

And the said A. Livingston Norman did then and there further depose and say, under his oath aforesaid, that he is acquainted with the said C. W. Pool and knows him to be the president of the said company; that the signature of the said C. W. Pool subscribed to the said instrument, is the genuine handwriting of him, the said C. W. Pool, and was thereunto subscribed by the like order of the said board of directors, and in the presence of him, the said A. Livingston Norman.

In testimony whereof, I have hereunto set my hand and notarial seal at the county and State aforesaid, the day and year above written.

——— ———,
*Notary Public.*

STATE OF NEW YORK, }
*City and County of New York,* } ss:

Be it remembered, that on this — day of ———, in the year one thousand eight hundred and ninety —, before me, the undersigned, — commissioner, resident of the city of ———, duly commissioned and qualified by the executive authority, under the laws of the State of Pennsylvania, to take acknowledgments of deeds, etc., to be used or recorded therein, personally appeared ——— ———, the — of the Farmers' Loan and Trust Company and ——— ———, the secre-
39 tary of said company, to me personally known to be the persons whose names are subscribed to the annexed instrument, as the — and secretary of said company, and severally acknowledged the same, as the free and voluntary act and deed of said The Farmers' Loan and Trust Company, by them severally and voluntarily done and executed, for the purpose therein set forth. And said ——— ——— being by me duly sworn, did depose and say that he resides in the city of ———.

That he is secretary of the Farmers' Loan and Trust Company. That the seal affixed to the foregoing instrument as the seal of said company is the corporate seal thereof. That it was affixed by the order of the board of directors of said company, and that he signed his name thereto by like order of said board.

And the said ——— ——— did then and there further depose and say, under his oath aforesaid, that he is acquainted with said ——— ——— and knows him to be the — of said company. That the signature of the said ——— ——— subscribed to said instrument, is the genuine handwriting of him, the said ——— ———, and was thereunder subscribed by the like order of said board of directors, and in presence of him the said ——— ———.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last aforesaid.

——— ———,
*Commissioner for the State of Pennsylvania.*

40 *Chancery Subpœna.*

UNITED STATES OF AMERICA, }
*Western District of Pennsylvania,* } ss:

The United States of America to the Pennsylvania Plate Glass Company, a corporation and citizen of the State of Pennsylvania; the Penn Plate Glass Company, a corporation and citizen of the State of Pennsylvania, and William L. Kann, a citizen of the State of Pennsylvania, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America for the

western district of Pennsylvania, at the city of Pittsburg, in said district, on the first Monday of August next to answer the bill of complaint of the Farmers' Loan and Trust Company, a corporation and citizen of the State of New York filed in the clerk's office of said court, in the city of Pittsburg, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default. And this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Pittsburg, aforesaid, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-six and of our Independence the 121st.

[SEAL.] H. D. GAMBLE, *Clerk.*

Served July 8, 1896, on the Pennsylvania Plate Glass Company by giving a true and attested copy hereof to Philip Semmer, president of said defendant company at his office in the city of Pittsburg. Also served on said defendant at same time notice of hearing of motion for preliminary injunction by giving a copy of order to its said president; same day served within writ and like notice
41 on the within-named Penn Plate Glass Company by giving copy duly attested of writ to William L. Kann, president of said defendant company at its office in the city of Pittsburg and giving him also a copy of said order and notice; and same day served within writ and said order and notice on William L. Kann, by giving him a true and attested copy of said writ and copy of said order at his office in the city of Pittsburg.

So answers—

JOHN W. WALKER,
*U. S. Marshal,*
Per A. W. GREGORY, *Deputy.*

MEMORANDUM.—The above-named defendants are required to enter an appearance in the above-entitled cause, on or before the first Monday of the month ensuing twenty days after the service of this writ, otherwise the complaint may be taken against them as confessed, and a decree entered accordingly.

H. D. GAMBLE, *Clerk.*

*Order Extending Time.*

And now Sept. 7th, 1896, on motion of complainant's solicitor, the time for filing answer, plea or demurrer is extended for one week.

BY THE COURT.

*Demurrer of Penn Plate Glass Company.*

This defendant, The Penn Plate Glass Company, by protestation, not confessing any or all of the things in the plaintiff's bill of complaint, contained, to be true in such manner and form as the same

is therein set forth and alleged, doth demur to so much of the said bill as is not answered, and for cause of demurrer showeth:

1. That the said bill doth not contain any matter or equity wherein this court can ground any decree, or give to the plaintiff any relief against this defendant.

42 2. And for a further cause of demurrer, this defendant protesting as aforesaid, alleges that the said plaintiff does not disclose a written request to the said plaintiff, as trustee, to commence this suit, and to foreclose the said mortgage or deed of trust, referred to in the said bill, and fails to aver that one-third of the holders of the bonds secured by the said mortgage or deed of trust, requested the plaintiff in writing to commence said suit to foreclose the said mortgage or deed of trust.

3. And for further cause of demurrer the said defendant further protesting, shows that the plaintiff has an adequate remedy at law, by proceedings for the foreclosure of the said described mortgage by *scire facias*.

4. That the mortgage sued upon by the plaintiff in this cause, discloses that there was no individual liability on the bonds secured by the said mortgage for the payment of the same by the Pennsylvania Plate Glass Company, and that therefore so much of the relief as prays for a decree for the amount of the aggregate of said bonds, which the property secured by the said mortgage would be insufficient to pay, is not warranted by the said mortgage.

5. That the said bill and the mortgage sued upon, made a part of the said bill, does not disclose any individual liability by this demurrant, for the debt mentioned in said bonds, for or by reason of its purchase and ownership of the plant and property of the Pennsylvania Plate Glass Company.

6. That the said bill is multifarious in including this demurrant as a codefendant in the said bill.

S. SCHOYER, JR.,
*Att'y for Demurrant.*

S. Schoyer, Jr., counsel for the demurrant, says that in his opinion the grounds for the demurrer above assigned are well founded in law, and that the same is not interposed for delay.

S. SCHOYER, JR.

43 *Demurrer of W. L. Kann.*

This defendant, W. L. Kann, by protestation, not confessing any or all of the things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to so much of the said bill as is not answered, and for cause of demurrer showeth:

1. That the said bill doth not contain any matter or equity wherein this court can ground any decree, or give to the plaintiff any relief against this defendant.

2. And for a further cause of demurrer, this defendant, protesting as aforesaid, alleges that the said plaintiff does not disclose a written

request to the said plaintiff, as trustee, to commence this suit, and to foreclose the said mortgage or deed of trust, referred to in the said bill, and fails to aver that one-third of the holders of the bonds secured by the said mortgage or deed of trust, requested the plaintiff in writing to commence said suit to foreclose the said mortgage or deed of trust.

3. And for further cause of demurrer the said defendant, further protesting, shows that the plaintiff has an adequate remedy at law, by proceedings for the foreclosure of the said described mortgage by *scire facias*.

4. That the mortgage sued upon by the plaintiff in this cause, discloses that there was no individual liability on the bonds secured by the said mortgage for the payment of the same by the Pennsylvania Plate Glass Company, and that therefore so much of the relief as prays for a decree for the amount of the aggregate of said bonds, which the property secured by the said mortgage would be insufficient to pay, is not warranted by the said mortgage.

5. That the said bill and mortgage sued upon, made a part of the said bill, does not disclose any individual liability by this demurrant, for the debt mentioned in said bonds, for or by reason
44 of his purchase and ownership of the plant and property of the Pennsylvania Plate Glass Company.

6. That the said bill is multifarious in including this demurrant as a codefendant in the said bill.

S. SCHOYER, JR.,
*Att'y for Demurrant.*

S. Schoyer, Jr., counsel for demurrant, says that in his opinion the ground- for the demurrer above assigned, are well founded in law, and that the same is not interposed for delay.

S. SCHOYER, JR.

*Order on Demurrer.*

And now, March 1st, 1897, on due consideration the demurrers filed are overruled.

*Per curiam:*

JOS. BUFFINGTON, *Judge.*

*Motion for Appointment of Receiver.*

And now, to wit, July 8, 1896, the complainant in the above-stated case, by its solicitors, J. S. & E. G. Ferguson, moves the court to appoint a receiver for the property described in the aforesaid bill of complaint, as prayed for therein, and also to grant a writ of preliminary injunction, restraining the defendants, their agents and servants, as prayed for in said bill, until the further order of the court, and on motion of said solicitors, the court fix- the 10th day of July, 1896, at 10 o'clock a. m., to hear said motions for the appointment of a receiver and for preliminary injunction. Due notice to be given to defendants.

By the court:

JOS. BUFFINGTON, *Judge.*

45 *Order Denying Motion.*

Sept. 7th, 1896. After due consideration the motion for appointment of a receiver is denied.

BY THE COURT.

*Answer of Penn Plate Glass Co. and W. L. Kann.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

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| FARMERS' LOAN & TRUST CO. *vs.* PENNSYLVANIA PLATE GLASS CO., PENN PLATE GLASS CO., and W. L. KANN. | No. 6, November Term, 1896. |

To the honorable the judges of the said court:

The joint and several answers of the Penn Plate Glass Company and W. L. Kann to the plaintiff's bill, (reserving to both and to each, all and all manner of just exception to the sufficiency of the said bill in law,) respectfully represent:—

1. These respondents specifically deny the averment contained in the 13th paragraph of the bill that the holders and owners of a very large number of said bonds have requested, in writing, the plaintiff to commence this suit and to foreclose the mortgage or deed of trust to the said bill annexed, if it be thereby meant that the holders of one-third or more of the said bonds have so requested the plaintiff to commence this said suit. These respondents aver to the contrary that the said plaintiff has not been requested in writing or otherwise by the holders of one-third of the said bonds to commence this said suit and to foreclose the said mortgage or deed of trust, but aver, upon information and belief, and as they expect to be able to prove upon the trial of this cause, the said plaintiff was so requested only by one J. G. Beemer, who, as these respondents believe, is the holder of forty-five thousand dollars of the said bonds in connection
46 with one George Cowan, who is, or was lately, the holder of a few of the said bonds, who have indemnified the said Farmers' Loan & Trust Company from the cost and expenses of the said litigation.

2. And these respondents further answering, without admitting the further averment in the said 13th paragraph that the holders of the bonds secured by the said mortgage or deed of trust, are numerous and that the names and residences of many of such holders of said bonds are unknown to the plaintiff, deny that therefore the plaintiff could not make such holders parties to the said bill, because, these respondents say that under the provision of the said mortgage contained in the 8th article thereof, (page 13,) ample provision is made for a meeting of all bondholders, at the call of the trustee, in the circumstances recited in the said provision, and that the said plaintiff could at any time have secured a meeting of the bondholders, as

therein provided, at which it could have informed itself of the names and addresses of all the bondholders.

3. Respondents further say that by the provisions of the 5th article of the said mortgage the majority of the bondholders have a veto power over the action of the trustee in the election to foreclose the said mortgage and over the action of the quorum of one-third of the holders of the said bonds in requesting, in writing, the institution of any suit or proceeding, and that the plaintiff, acting, as respondents aver and believe, and expect to be able to prove, in collusion with, and at the request of, the said Beemer and the said Cowan, has failed to afford to the majority of the bondholders any knowledge of the present proceedings, or of any other contemplated proceedings, or to give to them an opportunity of a meeting called in accordance with the terms of the mortgage, to exercise their veto power, if they saw proper so to do.

4. Respondents further answering, say that one of these re-
47 spondents, W. L. Kann, became the purchaser of the plant and property of the Pennsylvania Plate Glass Co., a corporation organized under the Corporation Laws of 1874 — Pennsylvania, at a receiver's sale, directed and decreed by the court of common pleas of Westmoreland county, in a certain proceedings in equity at No. 265 of said court, wherein George Cowan, Philip Semmer and others were plaintiffs and The Pennsylvania Plate Glass Company defendant, said decree being dated May 5, 1894, subject to the lien of the said mortgage described in the plaintiff's bill, said mortgage being the same recited in this bill, and that in pursuance thereof a deed was made to him, the said W. L. Kann, for the said property, by the said receiver, which was duly approved by the court of Westmoreland county, conveying to him the said property subject to the lien of the said mortgage. And that the said Kann subsequently granted and conveyed the property so purchased to the said Penn Plate Glass Company, codefendant.

5. These respondents humbly pray the court that the said plaintiff may disclose the written request averred in its said bill, of bondholders to bring this suit and to proceed to a foreclosure of the mortgage described, together with the signatures thereto.

6. These respondents further answering, say that as they are advised and believe, and expect to be able to prove, neither of these said respondents is under any legal, moral or equitable duty or obligation to advance the money to pay the coupons on the bonds secured by the mortgage described in the said bill, or to advance the money for the payment of the principal debt secured by the said mortgage; that as respects the bonds secured by the said mortgage, which are held by the said Beemer, the said Cowan and the said Philip Semmer, or A. C. Boyd, or A. C. Boyd & Company, or any of the holders of such bonds, mediately or immediately, from them acquired by such holders since the decree of insolvency of the Pennsylvania Plate Glass Company by the court of common
48 pleas of Westmoreland county, the same are not protected by any lien of the said mortgage on the premises acquired by the said Kann under the receiver's sale aforesaid, so ordered and

directed by said court of common pleas, and now owned and held by the Penn Plate Glass Company, through conveyance by him, the said Kann, because these respondents say that the said mortgage was illegally and fraudulently issued, and are wholly invalid and unauthorized and in direct violation of the laws and conditions precedent provided by the Commonwealth of Pennsylvania, to authorize the increase of indebtedness of corporations, under the Corporation Law of 1874, and its supplements, which law these respondents refer to, and make part of this answer, in this: That under the said law the right to issue bonds, with or without coupons and to secure the same by mortgage, is limited to an amount equal to one-half of the capital stock actually paid in. These respondents aver that at the time of the proceedings had for the issue of the bonds and the mortgage in the said bill mentioned, no part of the capital stock had been actually paid in; that the certificates and proceedings purporting to have been had relating thereto, and which were filed in the office of the secretary of the Commonwealth of Pennsylvania, as authority for the issue of the bonds and mortgage aforesaid, were absolutely and utterly false, within the personal knowledge of the said Beemer, said Cowan, said Semmer and the said A. C. Boyd; and respondents will produce upon the trial of this cause, copies of said certificates and proceedings, duly exemplified, and the transfer books and stock ledgers of the said Pennsylvania Plate Glass Company, and other evidence to fully substantiate these allegations.

They further answering, say that the stock described in said certificate as held by certain individuals, was, to them, the said Boyd, Beemer, Semmer and Cowan, well known to have been held by such holders as a mere cover for them, and that at, or immediately, or very shortly after the date of the proceedings had for the
49 creation of the said bonds and mortgage indebtedness, over seven thousand two hundred and twenty-five shares of the ten thousand shares of capital stock were returned to the treasury of the Pennsylvania Plate Glass Company, from whence it issued to the firm of A. C. Boyd & Company, contractors, for the erection of the Pennsylvania Plate Glass Company, said contracting firm being composed of A. C. Boyd, Phillip Semmer, George Cowan, and, as respondents believe and aver, and expect to be able to prove, of the said J. G. Beemer; and they further say that all of the bonds thus issued secured by the mortgage aforesaid, were also issued to the said A. C. Boyd & Company, and by them passed into the hands of the said A. C. Boyd, George Cowan, J. G. Beemer and Philip Semmer.

These respondents further answering, say that the said Beemer, A. C. Boyd, Philip Semmer and George Cowan were the promoters of the Pennsylvania Plate Glass Company; that to procure a charter from the Commonwealth of Pennsylvania, under the Corporation Law of 1874 aforesaid, they prepared false and fraudulent articles of association to be filed with the secretary of the Commonwealth, and filed the same with the secretary of the Commonwealth, and thereupon, and by reliance thereon, the governor of Pennsylvania issued letters patent to the Pennsylvania Plate Glass Company; that the

said certificate or articles of association were verified by affidavit, and represented among other things that the said George Cowan was the treasurer of the said corporation; that he had received as such treasurer ten per cent. of one million dollars of the capital stock, viz: one hundred thousand dollars, as required by the laws of Pennsylvania, in cash; that the stock of the said company had been subscribed for by one Wray E. Davis to the amount of three thousand eight hundred and eighty-seven shares (being three hundred and eighty-eight thousand seven hundred dollars of par value), the said Wray E. Davis being a porter in the store or warehouse of the said Cowan in New York city, and totally without
50 pecuniary resources; that Daniel Harrison, of Pittsburg, Pa., had subscribed for one thousand two hundred and twenty-six shares of the said capital stock (amounting to one hundred and twenty-two thousand six hundred dollars), when the said Daniel Harrison was a man without any pecuniary resources to justify any such subscription within the knowledge of the said promoters, and that Thomas McKie, of New York city, had subscribed for four thousand seven hundred and seventeen shares (aggregating four hundred and seventy-one thousand seven hundred dollars of the capital stock), whereas the said promoters well knew that the name of Thomas McKie was used as a mere cover for the purpose of the articles of association; and these respondents aver that out of all the subscriptions of capital stock set out in the said articles of association but two hundred and seventy shares were *bona fide* subscriptions; that all the rest of the alleged subscriptions were false and fraudulent, within the knowledge of the said Cowan, Boyd, Semmer and Beemer, and their names were used to conceal the real control of them, the said Beemer, Boyd, Semmer and Cowan, and that neither one hundred thousand dollars in cash or any part thereof was at any time ever paid in to the said George Cowan in money on account of stock subscription.

And these respondents further answering, say that in the certificates filed for the increase of indebtedness, and to authorize the issuing of two hundred and fifty thousand dollars of bonds secured by the mortgage described in the said bill, the said Cowan certified, under oath, that the said certificate contained a complete list of stockholders; and that the said holders were the owners of the entire issue of the stock of said company; whereas in truth and in fact they, the said alleged stockholders, were not the holders of such stock, within the knowledge of the said Cowan; that there were no takers of said stock, and none of them had made any payment in cash to the said company for any portion of the capital stock;
51 that in the list of said stockholders there *was* included A. C. Boyd & Company, for one thousand five hundred shares, and Wray E. Davis for seven thousand and fifty-two shares—an increase in the alleged holdings of said Davis of three thousand one hundred and sixty-five shares, aggregating three hundred and sixteen thousand five hundred dollars; that the said meeting to increase the indebtedness was held as set forth in said certificates, on the 15th of November, 1890; that the said certificates were filed in the office of

the secretary of the Commonwealth, on the 15th day of December, 1890; that at a meeting of the board of directors of December 18, 1890—three days later—it was resolved to cancel the subscriptions of the said Wray E. Davis, to the amount of six thousand and fifty shares, and of Daniel Harrison to the amount of one thousand and two hundred and twenty-five shares, aggregating seven thousand two hundred and seventy-five shares, amounting to seven hundred and twenty-seven thousand five hundred dollars, and to have the said shares returned to the treasury of the company; that subsequently, the shares so returned were issued to A. C. Boyd & Company, as contractors for the building of the works, and from them to the said Cowan, Beemer, Semmer and the said A. C. Boyd.

And these respondents further answering, say that there had never been a time from the original promotion of the said company until its insolvency under decree of the court of common pleas of Westmoreland county aforesaid, that the said company had not been wholly or solely under the control of the said Beemer, Semmer, Boyd and Cowan; and that whenever other names appear, at any time, as stockholders, or as directors, other than their own names, such names were used as covers to suit the purposes of the said four parties hereinbefore mentioned, and conveyed the land upon which the works were subsequently erected to the said company for $70,000 of stock, although the same had been donated free as an inducement for the location of said works.

52 These respondents further aver that should said Cowan, the said Beemer, the said Semmer and the said Boyd, be compelled to make payment of their just indebtedness to the said company, and to account for the moneys which they have alleged have passed in and to the said company, the said Pennsylvania Plate Glass Company would not have been insolvent, and would not be insolvent, today, and would be amply able to meet any liability it might be under on the said bonds secured by the said mortgage, as well as on all other indebtedness. That said Kann is a stockholder and a judgment creditor of the Pennsylvania Company and became an innocent holder and creditor without notice of the frauds alleged before proceedings for the appointment of the receiver aforesaid had been instituted.

7. These respondents further answering, say that as they are advised and believe, said mortgage does not cover any future improvements upon the said plant of the Pennsylvania Plate Glass Company, other than property, real, personal or mixed, belonging to the Pennsylvania Plate Glass Company at the date of the said mortgage, or which might thereafter be acquired by the said Pennsylvania Plate Glass Company, and did not purport to be a lien upon any improvements, machinery, additions or other property real and personal, or mixed, of any description whatsoever, which might thereafter be put upon the mortgaged premises by any subsequent owner of the said property; nor did the said mortgage include or purport to convey the franchises of the Pennsylvania Plate Glass Company; that therefore the said plaintiff is not entitled to the relief prayed for, as respects improvements and betterments put upon the said

mortgaged premises, by either of these respondents, under the acquisition of their several titles as aforesaid, nor to any of their rights or franchises other than the premises specifically described in the said mortgage.

8. These respondents further answering, say that since the
53 acquisition of the said property under the receiver's sale aforesaid, by the said Kann; and by the Penn Plate Glass Company, as a vendee of the said Kann, there has been expended for water works, to supply the water absolutely necessary for the running of said Penn Plate Glass Company, the sum already, of twenty-five thousand dollars, the basin for containing the supply of water being upon property not embraced in the said mortgage, nor at any time owned by the Pennsylvania Plate Glass Company. And have expended in the erection of a producer gas plant, twenty-five thousand dollars; and have also added to the equipment of the said plant, buildings and machinery which *has* doubled the capacity of the production of the plate glass over and above what the same was at the time of the receiver's sale aforesaid, or at any time prior thereto.

9. These respondents further answering, say that at the time of the receiver's sale aforesaid the Pennsylvania Plate Glass Company had no supply of natural or other gas for the running of its plant, and was dependent upon oil and coal, at an enormous expense; and had no adequate water supply for the operation of said works; and had had neither for a long period of time prior thereto; and aver that had the property described in said mortgage, at that time been sold upon proceedings to foreclose the said mortgage, the said mortgaged premises would not have produced a sum exceeding fifty per cent. of the face value of the bonds secured by the said mortgage. These respondents submit that in no event are the holders of said bonds entitled to any greater equity or rights in the premises now owned and controlled by the Penn Plate Glass Company, than the said premises at the date of the receiver's sale would have afforded the holders of said bonds, under foreclosure proceedings.

10. These respondents further answering, submit that so far as said bill prays for a receiver of the Pennsylvania Plate Glass Company, it is not entitled to such relief, because they say that
54 the court of common pleas of Westmoreland county, Pennsylvania, had acquired jurisdiction over the property and assets of the Pennsylvania Plate Glass Company, in the bill filed by Phillip Semmer, then president of the said company, and George Cowan, then treasurer of the said company, averring its insolvency and its inability to pay its debts, at the number and term hereinbefore recited, and praying for a dissolution and accounting, and the appointment of a receiver; and that in pursuance of the said bill the said court did appoint one Joseph W. Stoner receiver of all the property and assets of the said Pennsylvania Plate Glass Company, who has not yet been relieved from the duties imposed upon him by the appointment of the said court aforesaid; and that the said receiver has not been made party defendant to this bill.

11. These respondents further answering, say that the Penn Plate

Glass Co., the present owners of the premises described in the said bill are wholly solvent, with a capital stock of two hundred and fifty thousand dollars, of which two hundred and twenty-five thousand dollars have been fully paid in, and twenty-five thousand remains in the treasury, hereafter to be disposed of; that it is in full, and successful operation and is producing plate glass at the rate of one million two hundred and fifty thousand square feet of plate glass per year; that it is fully able and responsible to pay all and every indebtedness of the Penn Plate Glass Company, whether contracted in its own name, or whether the same may be adjudged to be due in this proceeding by the Penn Plate Glass Company; and that an interference with its operations by the appointment of a receiver will be destructive to the business of the Penn Plate Glass Company, and greatly to the prejudice of its employees, averaging about four hundred workmen, and to the fulfillment of existing contracts for the delivery of plate glass, in the future, by the said Penn Plate Glass Company, extending until November, 1897, and covering almost the entire production of the works for that period of time.

55 12. Respondents further answering, say that the said Beemer, Cowan and Semmer made false and fraudulent statements of the condition of the said company for the purpose of procuring money by loan, and did succeed by securing by said false representations, money to a large amount from this respondent, W. L. Kann; they specify that on December 22, 1892, the balance-sheet taken from the books and accounts of the said business showed a loss of over one hundred and nineteen thousand dollars; that the said parties hereinbefore named, deliberately changed said balance-sheet and prepared a false and fraudulent one showing a net profit of five hundred dollars for the current year, which they used to secure large loans; that to conceal the false and fraudulent alterations aforesaid, they, on or about the 22d day of December, 1892, either together, or with the knowledge of each other, caused the books of account of the Pennsylvania Plate Glass Company to be destroyed by burning, as these respondents are advised, informed and believe, and expect to be able to prove, and that today there are not to be found any of the books of account, or entries to show the character or extent of the business done by the Pennsylvania Plate Glass Company, prior to the 22d of December, 1892.

13. And these respondents further answering, say that the said fraudulent alteration of the balance-sheet was covered by the device of the said George Cowan, with the knowledge of said Beemer, and of said Semmer, on the 22d day of December, 1892, turning into the treasury of the said company seven hundred and nineteen shares of the capital stock of the company then held in his name; then immediately withdrew the same, electing to treat the return of the stock to the treasury as an asset resulting from the operation of the business of the company for the current year, to substantiate the allegation of a net profit of five hundred dollars. And the said

A. C. Boyd on the same day turned into the treasury for the
56 same purpose, one hundred and twenty-five shares, and subsequently, after such conversion to the treasury had served

its purpose, withdrew the same from the said treasury into his own personal name. And the said Philip Semmer, on the 22d day of December, 1892, for the same purpose, turned into the said treasury, five hundred and four shares, and subsequently, the same having served its purpose, with reference to the falsified balance-sheet, withdrew the same for his own personal use.

14. Respondents, further answering, say that in addition to the fraudulent conduct and actions hereinbefore recited, the said Beemer, Semmer, Boyd and Cowan, in fraudulent collusion with each other, caused contracts to be let to the firm of A. C. Boyd & Company, of whom certainly the said Boyd, the said Semmer, and said Cowan were partners, and as affiant believes, was also the said Beemer, at a gross overvaluation, for the construction of the plate-glass works of the Pennsylvania Plate Glass Company, for the purpose of enabling the said A. C. Boyd & Company to withdraw from the said company the whole of the capital stock and of the bonds, in payment thereof, so that the said works and real estate embraced in the said mortgage stand as having cost the sum of about one million dollars of the capital stock and two hundred and fifty thousand dollars of the bonds secured by the mortgage aforesaid. Whereas, in truth and in fact the same were not worth a greater sum than two hundred and fifty or three hundred thousand dollars. And the stock and the bonds so issued were divided and apportioned among them, the said Beemer, Boyd, Semmer and Cowan.

15. These respondents further answering, specifically deny the allegation contained in the 14th paragraph of the bill, that the said W. L. Kann and the Penn Plate Glass Company assumed and agreed to pay the bonds issued under the mortgage aforesaid, according to the tenor of the said bonds, and say that they
57 entered into no obligations, express or implied, to pay the said bonds, or the debt mentioned in the said mortgage, but did purchase the property described in the said mortgage, subject to the lien of the said mortgage, if any lien there were. And they further specifically deny that there existed on the part of any holder of the property under it, by the terms of the said bonds, any liability for the payment of the said bonds, and aver that the sole recourse of the holders of the said bonds, by their own contract and agreement, was by enforcement of the mortgage lien against the property specifically described in the said mortgage.

16. These respondents further answering, aver, under advice of counsel, that having purchased the property described in the said mortgage, subject only to the lien of the said mortgage, — have a right to assert all the defenses which may exist against the said mortgage, or to contest or deny the existence of any lien, by reason of said mortgage, that the said mortgagor, the Pennsylvania Plate Glass Company, could have done. That while they do not contest or deny the right of an innocent holder for value, who rely upon the mortgage aforesaid, they do deny the right of the plaintiff to enforce the said mortgage against the said property for the benefit of those who were parties to the frauds hereinbefore recited, or who have obtained their holdings of bonds by, through, or from, the said

Boyd, Beemer, Semmer and Cowan, or either of them, since the decree of the court of common pleas of Westmoreland county aforesaid, against the Pennsylvania Plate Glass Company.

Humbly submitting to this honorable court, that neither in law or in equity, or in morals, are the said Cowan, Semmer, Beemer or Boyd, as bondholders, entitled to enforce, through the medium of the plaintiff as trustee of the said mortgage, any lien of the
58 said mortgage, or the bonds held by them, these respondents pray that the relief be refused and these defendants dismissed at plaintiff's costs.

[SEAL.] PENN PLATE GLASS COMPANY,
By W. L. KANN, *President.*
W. L. KANN.

S. SCHOYER, JR.,
S. B. SCHOYER,
*Solicitors for Respondents Answering,*
139 *Fourth Avenue, Pittsburgh, Pa.*

*Complainant's Exceptions to Answer.*

And now, to wit, October 28th, 1896, the said complainant by its attorneys, J. S. & E. G. Ferguson, excepts to the joint and several answer filed in the above-stated case by the Penn Plate Glass Company and W. L. Kann, for that the said answer is impertinent in this:

First. Paragraph one of said answer sets up no matter of fact in contradiction to the averments of the thirteenth paragraph of the bill of complaint which it purports to answer, but in fact avers matter of law, because in substance it alleges that under the terms of the mortgage in suit the complainant was not entitled to begin suit unless requested in writing or otherwise, by the holders of one-third of the bonds secured by the mortgage sued upon; and if such request is necessary under the terms of the mortgage, then the matter alleged in said paragraph and answer is matter of demurrer to the bill, because the thirteenth paragraph of the bill does not allege that the holders of one-third of the said bonds have requested complainant to commence this suit, and to foreclose the said mortgage or deed of trust.

Second. And it further excepts to the said first paragraph of said answer on the ground of impertinence because said complainant says: That under the terms of the mortgage sued on, it had a right, in its discretion, upon default made, according to the terms of the mortgage, to begin suit without request from any of the
59 holders of bonds, and that therefore the averments of said paragraph that said complainant was only requested by said J. G. Beemer in connection with one George Cowan, is impertinent.

Third. The averments of the second paragraph of said answer are excepted to as impertinent, because it is unnecessary that the holders of the bonds should be made parties to this suit. Complainant was their trustee, and stands in their place and stead. And further, even if said bondholders were necessary parties, it was not bound to call

a meeting of the bondholders in order to ascertain their names and residences, and it is not a reasonable and necessary inference that calling such a meeting would have disclosed the names and residences of such bondholders.

Fourth. Complainant excepts to the averments contained in the third paragraph of said answer for impertinence because it says: That the paragraph avers matter of law in its allegation that the fifth article of the mortgage gave a majority of the bondholders a veto power over the action of the trustee in its election to foreclose said mortgage and that said majority had no opportunity in a meeting called in accordance with the terms of the mortgage to exercise their discretion if they saw proper so to do, and exceptant therefore says that the matter alleged in said paragraph is proper matter for demurrer and not for answer and because it says that under the true construction of the mortgage sued on the calling of such a meeting was unnecessary and exceptant had a right to exercise its discretion with reference to the foreclosing of said mortgage.

Fifth. Complainant excepts for impertinence to the prayer contained in the fifth paragraph of said answer because the request referred to therein, under the terms of the mortgage sued on, was unnecessary, and because in the first paragraph of said answer said respondents admit that complainant was requested by the holders of upwards of forty-five thousand dollars of the bonds secured by the mortgage in suit.

60 Sixth. Complainant excepts for impertinence to the averments of the sixth paragraph of said answer, because it says that having admitted in the fourth paragraph of said answer that the said Kann bought the premises described in the mortgage sued on subject to the lien of said mortgage, and that the said Penn Glass Company took the title of the said Kann thereto, the said Penn Glass Company and W. L. Kann have no standing in court to allege that the said mortgage was illegally and fraudulently issued, and that it is wholly invalid and unauthorized and in direct violation of the laws and conditions precedent provided by the Commonwealth of Pennsylvania authorizing the increase of indebtedness of corporations, and because all averments contained in said paragraph of said answer with reference to the requirements of said law are matters which do not concern the said answering defendants, and because the alleged fraudulent conduct of A. C. Boyd, George Cowan, J. G. Beemer and Philip Semmer, as set forth in the said paragraph of said answer, is wholly irrelevant to the issue in this case.

Seventh. Complainant excepts to the averments contained in the seventh paragraph of said answer as impertinent, because it says that the matter therein alleged is premature, and does not affect the right of complainant to a decree of foreclosure upon the mortgage sued upon.

Eighth. The complainant excepts to the allegations contained in the eighth paragraph of said answer as impertinent because it says that said answering defendants have admitted in the fourth paragraph of said answer that they hold the mortgaged premises subject to the lien of the mortgage sued on, and it is immaterial

what improvements they may have placed on the said mortgaged premises, and if they have any equity by reason of the facts alleged in said eighth paragraph of said answer, such equity cannot be asserted in bar of the decree of foreclosure.

Ninth. Said complainant excepts to the allegations con-
61 tained in the ninth paragraph of said answer as impertinent because it says: that said answering defendants having admitted in the fourth paragraph of their said answer that they hold the mortgaged premises subject to the lien of said mortgage, it is immaterial what improvements they may have put upon said premises, and if by reason of the matters alleged in the ninth paragraph any equity arises in favor of the said answering defendants, it cannot be asserted in bar of a decree of foreclosure.

Tenth. Complainant excepts to the allegations of the tenth paragraph of said answer for impertinence because it says: that said defendants have admitted in the fourth paragraph of their said answer that the title of the Pennsylvania Plate Glass Company to the premises described in the mortgage was sold under a decree of the court of common pleas of Westmoreland county, Pennsylvania, in equity, at No. 265 of said court by the receiver appointed by that court, subject to the lien of the mortgage in suit, and it was therefore unnecessary to make said receiver a party to the present action, as claimed in said paragraph of said answer.

Eleventh. Complainant excepts to the averments contained in the eleventh paragraph of said answer, because it says that before filing said answer, as appears by the records of the court, the appointment of a receiver was denied, and because it says that the matters contained in said eleventh paragraph are no bar to a decree of foreclosure upon the mortgage sued upon.

Twelfth. Complainant excepts to the allegations contained in the twelth paragraph of said answer, because it says that the matters therein contained are not relevant in this action, and because even if it were true that J. G. Beemer, Cowan and Semmer made false and fraudulent statements to the damage of W. L. Kann, such fact is no defense in the present action. It therefore excepts to the matters set forth in said paragraph of said answer in support of said averment as impertinent and irrelevant.

62 Thirteenth. Complainant excepts for impertinence to the allegations in the fifteenth paragraph of said answer because it says that the matters contained therein are wholly irrelevant.

Fourteenth. Complainant excepts to the allegations contained in the sixteenth paragraph of said answer, because it says that the matters therein contained are matters of law, and in any event would not bar a decree of foreclosure upon the mortgage, which is a proceeding *in rem*, and does not personally affect or concern the said answering defendants.

Fifteenth. Complainant excepts to the matters alleged in the seventeenth paragraph of said answer as impertinent because it says that the matters therein alleged do not concern the present issue, and because it says that said answering defendants having admitted that they hold the property described in the mortgage, subject to the

lien of said mortgage, they have no right to set up any interest or claim of the Pennsylvania Plate Glass Company, or its receiver, which might arise by reason of any such fraud as is alleged in said paragraph of said answer.

Sixteenth. Complainant further excepts to the said answer because it says that said answering defendants having admitted in the fourth paragraph of their said answer that they took the title to the mortgaged premises subject to the lien of said mortgage, in equity and good conscience it formed a part of the purchase-money thereof which they agreed to pay, and which they are bound to pay to the trustee of said mortgage, and all matters contained in the said answer, seeking to avoid such liability so far as the mortgaged premises are concerned, are wholly irrelevant and immaterial.

In all of which particulars said complainant excepts to the answer of the said defendants as impertinent and humbly prays that the said exceptions may be referred, and that the said matter in said answer excepted to may be expunged from the said answer.

THE FARMERS' LOAN AND TRUST CO., *Plaintiff*,
By its solicitors, J. S. & E. G. FERGUSON.

63 *Opinion Sur-exceptions to Answer.*

BUFFINGTON, *J.:*

The complainant has filed exceptions to the joint and several answers of the Penn Plate Glass Company and W. L. Kann in sundry specified particulars on the ground of impertinence.

The matter thus objected to consists, *inter alia*, in sundry allegations of fraud in the issue of bonds by the officers of the Pennsylvania Plate Glass Company; of lack of power in said corporation to execute the mortgage sought to be foreclosed, of its invalidity; the absence of *bona fide* ownership of the bonds and the payment of value therefor by the holders; of the right of the answering respondents to raise these questions, of their claim to equitable relief and compensation for betterments put upon the mortgaged premises by them, and that a request by a certain number of bondholders was a condition precedent to complainant's right to begin foreclosure proceedings.

Upon the questions whether these positions are well taken, and whether the facts alleged will, in the end, prove material in the suit upon the mortgage, we express no opinion.

To reach a conclusion upon these points would in substance involve a disposal of the entire case and the determination of important and disputed legal principles. Such a decision might have been reached had the complainant put the case down for hearing upon bill and answer. This it has not done, but in effect seeks to do the same thing by a motion to expunge matter as being impertinent.

An examination of the authorities makes it clear that such is not the purpose or scope of such a summary motion. In The Attorney General *vs.* Rickards, 6 Bevan, 450, the master of the rolls said: "The

court cannot go into all the merits of a case and consider what the ultimate rights of a plaintiff may be, for the purpose of determining,
and that upon an imperfect argument, whether certain allega-
64 tions, the materiality of which may be doubtful, are actually
to be considered as immaterial. It would have the effect of drawing the whole merits of a cause into question, upon an allegation of impertinence. This would certainly be an inconvenient mode of proceeding, and one not in the least degree, calculated to preserve any right which the party who takes the objection has in the cause; for if it should appear, upon the consideration of the case on its merits, that the allegations complained of are immaterial, they cannot, in any degree, support the equity of the case, or give the plaintiff any right as against the defendant."

Obviously such a course may be pursued where the matter complained of is certainly not pertinent, irrelevant and improper. Chapman *vs.* School District, Deady, 108; Federal Cases, 2607; and where the duty of the court to strike the objectionable matter from the record is plainly manifest, or as was said in Davis *vs.* Cripps, 2 Y. & Coll, ch. 443, "clear to demonstration." But where the impertinence is not thus "clear to demonstration" the propriety of abstaining from present decision is apparent for, as Story on the Equity Jurisprudence, § 267, says, "Nor will the court, in cases of alleged impertinence, order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for, if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs."

Moreover the leaning of the court is to give the answer a liberal construction on the point of matter irrelevant. Tucker *vs.* The Cheshire Rail Road Company, 1 Foster, 38; Woods *vs.* Morrell, 1 Johns Ch., 106; Griswold *vs.* Hill, 1 Paine, 390; Federal Cases, 5835.

In the light of these authorities we are constrained to overrule complainant's exceptions.

65 *Replication.*

And now, to wit, March 14, 1897, the plaintiff joins issue on the matters alleged in the answers.

J. S. & E. G. FERGUSON,
*Attorneys for Plaintiff.*

*Complainant's Testimony.*

Depositions of sundry witnesses taken before me, Thomas F. Daniels, a notary public within and for the county of New York and State of New York, on the 12th day of April, 1894, between the hours of 9 a. m. and 6 p. m., at the office of Turner, McClure & Rolston, in the Farmers' Loan and Trust Company's building, No. 22 Williams street, in the city of New York, county and State of New York, pursuant to the annexed notice, which depositions are to be read in evidence on behalf of the complainant in an action now pending in the circuit court of the United States for the western district of Pennsylvania, in which The Farmers' Loan and Trust Company, trustee, is complainant and The Pennsylvania Plate Glass Company *et al.* are defendants.

NEW YORK, *April 12th*, 1897—11 a. m.

*Appearances.*

Messrs. Turner, McClure & Rolston, solicitors for complainant, The Farmers' Loan and Trust Company, trustee.
Herbert B. Turner and Francis T. A. Junkin, Esqs., of counsel.
Sol. Schoyer, Jr., Esq., solicitor for defendants.

*Testimony of Whittlesey D. Searls.*

WHITTLESEY D. SEARLS, a witness called on behalf of the complainant, having been duly sworn, testifies as follows:

Direct examination by Mr. JUNKIN:

Q. Mr. Searls, where do you reside?
A. New York city.
66 Q. You are of full age?
A. I am.
Q. Are you in any way connected with The Farmers' Loan and Trust Company, the complainant in this suit?
A. I am.
Q. What is your relation to that company?
A. Vice-president.
Q. For how long have you been vice-president?
A. Fifteen years.
Q. As such, is it your duty to pass upon the corporate trusts which it accepts?
A. Yes.
Q. (Paper shown witness.) I hand you an instrument which purports to be a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company. Will you examine it?
A. (Witness looks at paper handed to him.)
Q. Was that instrument accepted by the Farmers' Loan and Trust Company?
A. Yes.

Q. By whom is it signed on behalf of the Farmers' Loan and Trust Company?

A. It was signed by R. G. Rolston, as president, and attested by E. S. Marston, as secretary, who attached the seal of the corporation to the document.

Q. Are you familiar with each of those signatures and with that seal?

A. Yes.

Q. Are those the signatures of Rosewell G. Rolston and E. S. Marston, as president and secretary, respectively, and is that the seal of the Farmers' Loan and Trust Company?

A. Yes.

Q. At the end of the mortgage is there a certificate as to the recording of the mortgage?

A. There is the certificate of the recorder of Westmoreland county, Pennsylvania.

Q. What date was it recorded?

A. 12th day of January, 1891.

Q. Where was it recorded?

A. Mortgage Book 43, page 1, etc., in the county of Westmoreland, State of Pennsylvania, signed by William B. Conway, recorder.

67 Q. You accepted the trusts created by this instrument and acted as trustee under this mortgage?

A. Yes.

Q. Ever since the day of its date, which was the 1st of January, 1891?

A. Yes.

Mr. JUNKIN: I offer the mortgage in evidence.

The original mortgage is marked "Complainant's Exhibit 1, April 12, 1897," and it is agreed that said mortgage may remain in possession of counsel for the complainant and a copy thereof be attached to the deposition, the original mortgage to be produced at the trial, if desired.

Q. What did you do with respect to the certifying of bonds under the trust?

Mr. SCHOYER: I object, because the presumption is that he did what his duty was as prescribed by the mortgage, and it has no relation to the particular issue in this case.

A. The bonds were all certified and delivered.

Q. Have you records in your office in which the certification of bonds is noted and in which you take receipts for the delivery of bonds?

A. We have.

Q. It is your usual course?

A. It is.

Q. Will you produce the book in which such record is kept in this case?

(Witness produces book.)

Mr. SCHOYER: I make no objection to the validity of this book, if you will have the entries referred to copied.

Q. What record have you in your hand?
A. The record of new bonds, known as No. 6 of the Farmers' Loan and Trust Company records.
Q. At what page of that record have you entries relating to the Pennsylvania Plate Glass Company bonds?
A. Pages 456 and 457.
Q. What do those pages show?
A. On page 456 appears as follows: Headed "Pennsylvania Plate Glass Company, Irwin, Pennsylvania." Below that: "1891,
68 $1,000. Jan 14, rec'd. Bonds Nos. 1 to 250. Order. Page 457: "1st mortgage 6 per cent. 10-year gold bond. Paid. A. Livingston Norman."
Q. Will you explain briefly what that entry means?
A. It means that there were 250 bonds of $1,000 each of the Pennsylvania Plate Glass Company delivered to A. Livingston Norman upon an order of the company.
Q. What does the word "paid" refer to?
A. Trustee's fees were paid.
Q. The fees for certifying the bonds?
A. Yes.
Q. Does it or does it not also indicate that those 250 bonds were certified by you in accordance with the terms of the mortgage before their delivery?
A. This indicates that the bonds were certified before delivery.
Q. Who was A. Livingston Norman?
A. I don't know.

Mr. SCHOYER: I call for a copy of the order of the company referred to by the witness.
Mr. JUNKIN: We will produce it and have it marked as an exhibit.

Q. Was the order referred to for these bonds in writing?
A. It is in writing.
Q. You have testified that you certified and delivered 250 bonds of $1,000 each as called for by the mortgage. Have any of those bonds ever been paid or cancelled, as far as you know?

Mr. SCHOYER: What is the purpose of that question?
Mr. JUNKIN: I think it explains itself.
Mr. SCHOYER: I object to it as irrelevant.

A. Not to my knowledge.
Q. Would you know it if they had been cancelled by the Farmers' Loan and Trust Company?
A. I would have to refer to my records.
Q. Will you refer to your records and see whether any of these bonds have ever been cancelled by the Farmers' Loan and Trust Company?
A. I will.

69 Q. Were you accustomed, as trustee, to pay over your counters, as they became due, the instalments of coupon interest under this mortgage?

A. When provided with money we disbursed the money and cashed the coupons.

Q. What was the last coupon you paid with money furnished by the Plate Glass Company?

A. January, '94, we paid coupons due on that date.

Q. After the payment of coupons in this way what did you do with the coupons?

A. Returned them to the company with a statement.

Q. Were they or were they not cancelled?

A. They were cancelled.

Q. Were any coupons paid by you after the coupon of January 1, 1894?

A. Yes; the coupons of July, 1894, and January, 1895, were paid. I am uncertain as to whether all or only a portion were paid, but before the testimony is closed I will give it exact.

Q. Were they cancelled?

A. They were.

Q. By whom was the money furnished for the payment of those coupons which matured in July, 1894, and January, 1895, if you know?

A. By W. L. Kann.

Q. Were the coupons that were paid, whether the July, 1894, or January, 1895, coupons, cancelled?

A. They were.

Q. What was done with them after their cancellation?

A. They were returned to W. L. Kann with an account.

Q. No payment of interest has been made on this mortgage by the Farmers' Loan and Trust Company, as I understand from your testimony, since the 1st day of July, 1895?

Witness produces the written order called for by counsel for the defendants.

Mr. JUNKIN: I offer that order in evidence.

The original order is marked "Complainant's Exhibit 2, April 12, 1897," and it is agreed that the original may remain in
70 the possession of counsel for the complainant and a copy thereof is set out in the deposition, the original to be produced at the trial, if desired.

The following is a copy of Complainant's Exhibit 2:

"IRWIN, PA., *Jan.* 13, 1891.

To Farmers' Loan & Trust Co., New York:

Please deliver to A. L. Norman the $250,000 first-mortgage bonds of the Pennsylvania Plate Glass Co. when endorsed by you, and oblige,

PENNSYLVANIA PLATE GLASS CO.
C. W. POOL, *President.*"

(Endorsed:) "A. Livingston Norman."

Q. What is the signature to this order?

A. C. W. Pool, president.

Q. Was he president of the Pennsylvania Plate Glass Company at that time?

A. I presume he was.

Q. Was the mortgage signed by him?

A. (Refers to mortgage.) Apparently he was the president of the *company. The mortgage is signed by C. W. Poole, as president,* and A. Livingston Norman, as secretary. That brings out who A. Livingston Norman is.

Mr. SCHOYER: We know that. There is a question unanswered, I think.

At the request of counsel, the stenographer repeats the question unanswered by the witness, as follows: "No payment of interest has been made on this mortgage by the Farmers' Loan and Trust Company, as I understand from your testimony, since the 1st day of July, 1895?"

Mr. JUNKIN: Please answer that question.

A. That date is wrong.

Q. I want you to correct it if it is wrong.

A. The last payment of interest disbursed by the Farmers' Loan and Trust Company was the interest due January 1st, 1895, at which time the Farmers' Loan and Trust Company disbursed sufficient money to meet all the coupons from 250 bonds of $1,000 each. That is the whole history of it.

71 Q. With reference to the cancelling of bonds, do you want to change in any way the answer you gave above?

A. I desire to state to the best of my knowledge no bonds have been cancelled by the trust company.

Q. Would you have known it if any bonds had been cancelled?

A. My record would have shown it.

Q. The interest which became due July 1st, 1895, has not been paid by the Farmers' Loan and Trust Company?

A. It has not.

Q. Was the whole of the coupon interest which became due July 1st, 1894, and the whole of the coupon interest which became due January 1st, 1895, paid?

A. It was.

Q. By money furnished as you have testified above?

A. Yes.

Q. Has any interest been paid by you on any coupon which has become due since the date of January 1st, 1895?

A. No.

Q. Have you any funds in your possession from which such interest might have been paid?

A. No.

Q. Or any part of it?

A. No.

Q. (Paper shown witness.) I show you a paper, purporting to

have attached to it the seal of the Farmers' Loan and Trust Company. Will you examine it and state what it is?

A. (Examines paper.) It is a declaration by the trustee declaring the principal and accrued interest due upon the mortgage made by the Pennsylvania Plate Glass Company, in consequence of default in payment of interest.

Q. By whom was that paper signed?

A. R. G. Rolston, as president, and attested by E. S. Marston, as secretary, and the corporate seal of the Farmers' Loan and Trust Company is affixed thereto.

Q. You are familiar with both of those signatures and that seal?

A. I am.

72 Q. And the signatures are the signatures of R. G. Rolston and E. S. Marston?

A. They are.

Q. And the seal is the seal of the Farmers' Loan and Trust Company?

A. It is.

The paper last shown witness is marked Complainant's Exhibit 3 for identification, April 12, 1897.

Mr. JUNKIN: I offer that in evidence.

Mr. SCHOYER: On behalf of the defendants I object to it because there is no proof of the delivery of this notice of declaration to the Pennsylvania Plate Glass Company and all persons interested therein, especially to the defendants in this bill.

The following is a copy of Complainant's Exhibit 3 for identification:

"To the Pennsylvania Plate Glass Company and all persons interested therein:

Take notice that whereas the Pennsylvania Plate Glass Company has made default in the payment of the semi-annual installment of interest on its bonds secured by its first mortgage, bearing date January 1, 1891, between the Pennsylvania Plate Glass Company and the Farmers' Loan and Trust Company, according to the tenor of said bonds and the coupons accompanying the same, and such default has continued for a period of six months after demand by said trustees in writing for the payment of the said moneys:

Now, therefore, the Farmers' Loan and Trust Company, as trustee under said mortgage, has elected and does now hereby elect and declare that the principal of all the bonds secured by said mortgage and the accrued interest thereon have become due and payable and immediately collectible from and out of the mortgaged premises.

Dated New York, July 6, 1896.

THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON, *President.*

Attest: E. S. MARSTON, *Secretary.* [SEAL.]"

73 Q. Mr. Searls, has the Farmers' Loan and Trust Company been requested by the holders of any of the bonds issued under this mortgage to take any action in respect to the enforcement of the lien of the mortgage?

Mr. SCHOYER: I object because there is no averment in the bill of any written authorization made by bondholders or any quorum of them to file a bill, and the omission of such an averment having already been the subject of demurrer, the question raised thereby having been reserved by the court.

A. Yes.
Q. Was such request in writing?
A. It was.
Q. Have you such request?
A. I have.

Cross-examination by Mr. SCHOYER:

Q. Mr. Searls, I presume that in your testimony you have been guided more by the procedure, records of your office than from your personal knowledge?
A. Yes, sir.
Q. So these various signatures in papers that have been presented to you, you were not present at the time of the execution, but you recognized the handwriting?
A. No; I was not present at the execution that I can positively state, but yet I may have been.
Q. You are speaking of the authenticity of the papers because they form part of your system of business and the records of your office?
A. Yes, sir.
Mr. SCHOYER: May I look at that order?

Complainant's Exhibit 2 is handed to counsel.

Q. What was the date of that mortgage?
A. January 1st, 1891, I think.
Q. I see that while the mortgage bears the date of January 1st, 1891, the acknowledgment of your company was on the 8th of January, 1891?
A. (Refers to mortgage.) Yes; that is right.

74 Q. Do you know when this mortgage was deposited with you; is there anything on the paper which will enable you to state?

A. It may have been in our office two or three days before it was acknowledged.
Q. I mean the formal delivery to you as trustee, is there any endorsement on the back of the mortgage to enable you to show it?
A. No; there is nothing there to show that to us, but it was evidently before the 14th of January, the day of the delivery of the bonds, because we always demand the mortgage back from record before we deliver bonds.

Q. There is no formal acceptance of the trust on your part?

A. Not beyond the acceptance by our signature; our signature being attached to it there is evidence of acceptance.

Q. Then this order, Exhibit 2, bears date January 13, 1891. Do you know when that passed into your custody?

A. On the 14th of January.

Q. Did you personally deliver these bonds?

A. I did.

Q. That was in your department?

A. Yes, sir.

Q. You have no evidence from the company that the bonds had been sold?

A. No, sir.

Q. Did you register them or authenticate the whole of them at one time and deliver them to A. Livingston Norman?

A. Yes, sir.

Q. Who appears to be the secretary of the company on this order?

A. On that order of the president of the company we delivered them.

Q. You had no seal of the Pennsylvania Plate Glass Company on this order?

A. No, sir.

Q. Do you know who presented this order?

A. Well, I could not say positively now, but I presume A. Livingston Norman, inasmuch as I have his signature here as having delivered the bonds to him.

Q. Did you make any inquiry to satisfy yourself that Pool was president and Norman secretary beyond the fact that they had executed the mortgage?

A. Nothing beyond the fact of comparison of signatures.

75 Q. You were not presented with any resolution of the board of directors of that company directing this delivery of bonds?

A. No, sir; the mortgage did not call for it.

Q. But as a matter of fact you did not have any such?

A. No.

Q. This other Exhibit 3 for identification was there a duplicate of this issued?

A. Not to my knowledge.

Q. This declaration then remained where from the time of its date, July 6, 1896?

A. That was executed and handed to our counsel; I presume our counsel took care of it after that and put it where it belonged.

Q. You also testified you had a written request of certain bondholders authorizing you, or urging you, to file this bill, I believe?

A. Yes.

Q. And you had that in your hands?

A. Yes.

Mr. JUNKIN: He did not testify that he had it in his hand.

Q. It was the paper you held in your hand when you answered that question; it was the authorization?
A. It was.
Q. Will you produce it?

Mr. JUNKIN (referring to bundle of papers): I don't think you can, Mr. Searls. It is not here.
Mr. SCHOYER: Put down what counsel states.

Q. Why can you not?
A. Because it is not now in my possession.
Q. Is it not in possession of your counsel who is conducting this examination?
A. Well, I could not say.
Q. You think not, is that your answer?
A. Yes; I could not say.
Q. To whom did you deliver it after it left your hands during this examination?
A. My counsel.
Q. Who is now present?
A. Yes.
Q. He did not eat it, did he? Is that the best answer you can give to my question?
A. That is the best answer I can give at present, yes, sir.
76 Q. What is your objection to producing it?
A. Not being in my possession.
Q. Can you state the contents of it?
A. Not from memory, no.

Counsel for defendant gives notice that unless that paper is produced he will move to strike out the testimony of the witness in relation to having a written authorization.

Q. The paper referred to is part of the records of the Farmers' Loan and Trust Company, of which you are the custodian, are you not?

Mr. JUNKIN: Counsel for complainant objects to the question as being irrelevant and incompetent. There has been no paper referred to that is specific. The witness has had a large number of papers in his hands. You can describe any paper which he has had in his hands specifically and you may be able to refer to it probably, but I object to any such indefinite question as "the paper referred to."

A. (No answer.)
Q. When you answered the question addressed to you by your counsel that you held a written authorization of bondholders requesting you to proceed and file this bill, you had in your hands a paper, which I understood you to say was the written authorization of said bondholders?

Mr. JUNKIN: He did not say anything of the sort.

A. (No answer.)

Q. I then ask you was it or was it not that written authorization?

A. I refer to my answer to the question, if the stenographer will read it.

At the request of counsel, the stenographer reads from his notes the testimony referred to, as follows: "Q. Was such request in writing? A. It was. Q. Have you such request? A. I have."

Q. I now ask you to produce the paper referred to in that question and answer.

A. I am unable to produce the paper inasmuch as it is not in my possession.

77 Q. In whose possession is it, to the best of your knowledge and belief?

A. I can't tell, as I don't know.

Mr. JUNKIN: This whole line of questioning is objected to by complainant's counsel as referring to something that is not described, that is not shown to be at this time in existence, that has no relevancy to the question now before us, the witness having simply testified that the trustee received a request in writing from certain bondholders to take action for the enforcement of the lien of this mortgage.

Recess, 12.30 p. m.

2 P. M.

Q. Mr. Searles, the Farmers' Loan and Trust Company are very largely engaged in the trust business?

A. Yes, sir.

Q. And neither the company nor you have any personal interest in the trusts except to obey the commands of the trust?

A. That is all, sir.

Q. I suppose you have read this mortgage carefully?

A. Not lately; originally I did, I think.

Q. Did you ever read it?

A. I think I have read it.

Q. And you are conversant, therefore, with all the requirements?

A. No; I would not say that; I have read so many of them.

Q. Well, Turner, McClure & Rolston are the general counsel of your company?

A. Yes, sir.

Q. Your attorneys, in point of fact?

A. Yes, sir.

Q. And act for you?

A. Yes, sir.

Q. And when they have papers connected with any case or trust which you have, those papers are at your command; I suppose that you can have them back, if you care for them; they are put there by you and are held by them as your agents or attorneys?

A. Yes, sir.

Q. And hence the paper which you held in your hand this morn-

ing, and which passed from you to your attorney, Mr. Junkin, was in your control, wasn't it, if you chose to call for it?

78 Mr. JUNKIN: I might say here that I simply handed that paper to Mr. Beemer, and Mr. Beemer is going to prove that request.

Mr. SCHOYER: I feel a little hurt that I did not get that paper, and I want him to answer.

A. Yes.

Q. And you did not therefore choose to call for it when I asked for it?

A. Do you recall what I responded? I said I did not have that.

Q. I repeat my last question?

A. No.

Q. And if you had cared to call for it, you could have had the paper at your request?

A. I don't know about that.

Q. And yet Mr. Junkin is your attorney, and that paper passed from your hands to his, sitting at the counsel table?

A. I stated that the paper was handed to my counsel.

Q. At the counsel table?

A. Whatever you call it.

Q. At this table in the presence of the stenographer and commissioner?

A. Now you are asking questions and answering them yourself.

Q. I repeat my last question.

Mr. JUNKIN: I object to this whole line of examination as being entirely irrelevant and as referring to a paper which is not in evidence, which counsel does not describe, and which it is not shown has any materiality to this examination.

A. (No answer.)

At the request of counsel the stenographer reads from his notes the following questions and answers: "Q. And yet Mr. Junkin is your attorney and that paper passed from your hands to his, sitting at the counsel table? A. I stated the paper was handed to my counsel. Q. At the counsel table? A. Whatever you call it. Q. At this table in the presence of the stenographer and commissioner?"

79 Q. What answer do you make to that?

A. As I stated before, I handed the paper to my counsel.

Q. Where and when, after you looked at it this morning?

A. About half past twelve o'clock on the 13th day of April, 1897. If you are going to be technical, I am going to be technical, too.

Q. Meaning today, in the coure of this examination, although this happens to be the 12th?

A. Is today the 12th?

Q. Yes.

A. I am a day ahead, then.

Q. Meaning today,—I want to locate it, you did have it in your

hand and it passed from you to Mr. Junkin in the presence of the commissioner?

Mr. JUNKIN: It will be put in evidence.

A. (No answer.)
Q. I repeat my question.
A. I will leave the commissioner to say himself whether it passed in his presence or not; I am not going to say whether it passed in the presence of the commissioner.
Q. I mean by the commissioner, Mr. Daniels, who is taking this testimony?
A. I think he was here at the time.
Q. What personal interest have you in bringing this procedure?

Mr. JUNKIN: You mean the foreclosure suit?
Mr. SCHOYER: I am not asking you.
Mr. JUNKIN: But I want to understand the question as well as the witness.
Mr. SCHOYER: Yes; bringing this bill for foreclosure.

A. None whatever.
Q. There is a provision, is there not, in this mortgage, requiring indemnity for costs before you proceed or incur costs by proceedings for foreclosure?

Mr. JUNKIN: I object. The mortgage speaks for itself, the instrument itself is in evidence.

80 A. I must refer you to the mortgage, and if it is a legal matter it is always left to our counsel.
Q. Complainant's Exhibit 1 handed to witness. I now hand you the mortgage and call your attention to the clause referred to in Exhibit No. 1, and ask you whether that is a legal question or a financial one.

Mr. JUNKIN: I object to that as asking for an expression of opinion.

A. I don't see what you have reference to here.
Q. I call attention to that part of article tenth as follows:
The WITNESS: Where do you commence to read from?
(Q. continued.) "But the trustee shall be under no obligation"—have you found it?

Mr. TURNER: That is on page 15; you handed him page 16.

(Q. continued.) "But the trustee shall be under no obligation to institute any such suit, or to take proceedings under this indenture, or to enter any appearance or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and from all possible claims for damages for which it may become liable or responsible on proceedings to carry

out such request or demand." Is that in your judgment a legal or financial question?

A. Both.

Q. Are you able to make an answer now, whether or not you had not the power under the mortgage to demand indemnity such as is provided for in the paragraph I have read?

Mr. JUNKIN: I object to that, on behalf of complainant, as calling for an expression of opinion, the witness being asked to interpret an instrument which is the mortgage in evidence.

81 A. Yes; we had the power.

Q. Did you secure indemnification from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and from all possible claims for damages for which your company might become liable or responsible on proceeding to carry out the request for the institution of this bill of foreclosure?

Mr. JUNKIN: I object to that as entirely immaterial and irrelevant.

A. The mortgage does not make it mandatory.

Q. I repeat my last question. (Last question repeated by the stenographer from his notes.) I am asking you as to a fact.

A. I don't know.

Q. Who would know, sir; whose duty is it to know?

A. Well, some of the officers of the company would know something about it.

Q. Can you name such officers whose duty it would be to know, if you are not the proper officer?

A. I don't say any proper specific officer.

Q. If you had such indemnification, it would be in your office and open to your inspection, wouldn't it?

A. It would be open to my inspection, yes.

Q. Will you produce it?

A. If I can.

Q. Do you happen to know who did indemnify you?

A. No.

—. Was the process of indemnification not brought to your attention?

A. It was not.

Q. Who authorized the bringing of this suit; who authorized your attorneys to bring this bill?

A. The president of the company.

Q. Have you any knowledge that he had so authorized the bringing of the suit?

A. Not specifically.

Q. Did you have the same kind of knowledge which has enabled you to testify in chief as to the records and procedure of your business?

82 A. I don't exactly understand the question, what you want, what you are trying to drive at.

Q. I will explain it—that in your testimony-in-chief you an-

swered without hesitation about matters of which you had no personal knowledge, but of which you did have knowledge because it was a part of the procedure of the institution upon which you had a right to rely. Now I want to know whether you had the same kind of knowledge of the matter of fact of indemnification, of the matter of fact of placing this procedure or giving instructions to your counsel to bring this suit?

Mr. JUNKIN: The witness has already testified he had no knowledge of indemnification.

Mr. SCHOYER: I now protest against the interruptions of counsel beyond the making of a legitimate objection, for the purpose of telling the witness how to answer.

Mr. JUNKIN: I object to the question last asked as improper because it attributes to the witness testimony which the witness has not given, and I further state that I do not interrupt for the purpose of instructing the witness how to answer.

A. Well, I am at sea yet to understand what the question is, what question you ask me to answer.

Q. I cannot make it plainer. I will therefore ask you another question. Do you know, from records of your office or from interviews with your counsel, or from some source which impresses itself upon you as a fact, that Mr. James G. Beemer has indemnified your company and your counsel for the disbursements, counsel fees and other matters, before you ordered or authorized the institution of this bill of procedure?

A. No; that is not within my knowledge.

Q. Mr. Rolston, the president, is sick?

A. He is.

Q. And you are acting president now in his absence?

A. Yes, I am.

83 Q. When you say it is not within your knowledge, you speak, therefore, of your personal knowledge, but it may be within your knowledge if you choose to look for it?

A. I presume I could look it up.

Q. Well, would you have any objection to looking it up, and we will suspend the examination until you do?

A. I have no objection. I could not tell how long it would take me though.

Q. How long do you suppose it would take you?

A. I should not want to determine.

Q. In the bond, if you will look at the recitation of the bond in that mortgage, this clause occurs, just before the attestation clause: "This bond shall not become obligatory until it shall have been authenticated by the certificate of the Farmers' Loan and Trust Company endorsed hereon." Do you consider that provision for the benefit of the purchasers of the bond?

A. Yes, sir.

Q. And yet you so authenticated the entire issue and gave it to the officers of the company without any notification that the same had passed into the hands of purchasers?

Mr. JUNKIN: Without notification to whom?

Mr. SCHOYER: To the company, the Farmers' Loan and Trust Company.

A. We never received notification where bonds go after they have been certified and delivered in accordance with the terms of the mortgage.

Q. Can you explain then what protection the purchasers of bonds would have by virtue of your authenticating those?

A. Yes; evidence that we certified it was one of an issue described in the foregoing mortgage.

Q. And that you mean by "authentication"?

A. Yes; it says here: "This bond is one of the series of two hundred and fifty bonds."

Q. And without a paper, an order such as exhibited here and marked Exhibit 2, purporting to be signed by a man of whom you
84 had no personal acquaintance, I presume, directing the entire issue of these bonds to be given to the secretary of the company, with whom you had no prior acquaintance, you felt you were in strict compliance with your duty as trustee?

A. That paper did not read as you say.

Q. Then I have to beg your pardon.

A. The name "secretary" I don't think appeared on that.

Q. But you have already testified you delivered it to the man who signed the mortgage as secretary of that company.

A. No; I have not.

Q. Then I ask again, Is it not true that the payee in that order, Exhibit 2, is the person who attested the mortgage of the Pennsylvania Plate Glass Company as its secretary?

A. Apparently so.

Q. Apparently so. And at the time then you honored the order you were in doubt—whether you were or not—that the payee was the same individual who was the secretary of the Pennsylvania Plate Glass Company?

A. We did not care.

Q. And you also saw the name of the drawer of that paper, Mr. Pool, as president?

A. Yes, sir.

Q. Did you care whether he was actually the president or not, or did you make any inquiry?

A. We made comparison with the mortgage as to the signature.

Q. And did you make comparison of the endorsee signature on that order—that signature of A. Livingston Norman was correct, did you compare it with the signature of A. Livingston Norman as secretary of that company?

A. The order being made for the delivery of the bonds to him in full, individually, we did not recognize him as secretary receiving them.

Q. Then you regarded him as a stranger?

A. No; we did not.

Q. You did not as a matter of fact know or care to look at the signature?

A. I know the signature was compared, as to the president, but not compared with the secretary's.

85 Q. Did you compare it with the signature on that mortgage?

A. Yes, sir.

Q. And that conveyed no idea to your mind that the endorsee of that order or the payee in that order might or might not be the secretary of the Pennsylvania Plate Glass Company, who had attested the mortgage?

A. We had no right to question whether he was secretary or not.

*A.* I don't want to argue so much with you if I can get an answer.

A. I am trying to answer you as I think responsive to your questions. You are trying to identify the man as secretary who received the bond. I am distinctly trying to state he did not receive them as secretary.

Q. You notice on Exhibit 2, in this order, there was no seal of the corporation?

A. No, sir.

Q. And you were not furnished with a resolution of the board of directors?

A. No; I don't know that there was one.

Q. There was no resolution of the board of directors?

A. No; I don't say there was no resolution; I don't know.

Q. You were not furnished with one?

A. We did not want it.

Q. In point of fact, you were not—it is a matter of fact I am asking you about?

A. You asked me a question of which I am not positive; I am not positive there was one in existence.

Q. Did you receive any authorization except that order?

A. None.

Mr. JUNKIN: You have already asked that question long ago. I did not object to it on that ground, however.

Q. You know who the bondholders were, don't you, generally?

A. No, sir.

Q. And you knew further——

Mr. JUNKIN: At what time?

(Q. continued.) At the time you brought this proceeding to foreclose?

A. No; I did not.

86 Q. But you did know that one of the paragraphs of article 8 did provide "that whenever and as often as any contingency shall arise in which a meeting of the holders of the bonds hereby secured shall be necessary or expedient, it shall be the duty of the trustee, or of the president of the party of the first part, on the written request of the holders of not less than one-fifth in amount of the principal of the bonds then outstanding, stating therein the object of such meeting, to call a meeting of the holders of the then outstanding bonds secured hereby, to be held at some convenient place in the town of Irwin, Pennsylvania, by advertisement in at least two news-

papers published in the said city of New York and the city of Pittsburg, Pennsylvania, such advertisement to be published daily in such newspapers for at leas- ten days immediately preceding the time named for such meeting," at or before the bringing of this bill of foreclosure?

A. I did not.

Q. Were you, or were you not, advised by your counsel of this provision?

A. I was not.

Q. Then you, as representing the company, did not, in point of fact, call such a meeting?

A. I did not.

Q. Were you not also aware that under a paragraph in article fifth of the mortgage, a majority in interest of the holders of the principal of the bonds secured by that mortgage then outstanding and unpaid, might waive the right of the trustee to declare the bonds immediately collectible, on such terms and under such conditions as such majority might deem proper, or might annul or reverse such election by the trustee declaring the bonds immediately collectible?

Mr. JUNKIN: The question is objected to as calling for an expression of a legal opinion by the witness and asking the witness to determine the meaning of a clause in the mortgage.

A. No.

87 Q. And in point of fact, you made no arrangement or effort—your company, as such, made no arrangement or effort to get the view of the majority in interest of the holders of the bonds on the question of your election to declare the bonds immediately collectible?

A. I don't know.

Q. Mr. Searls, do you not know that you did not, and that your company did not make such a call?

A. No; I do not.

Q. Would there be a record kept in your office of such call, if it had been made?

A. It might have been.

Q. In preparing to give your testimony here, have you not examined the records of your company with reference to this entire matter?

A. I have not.

Q. Have you not caused examination to be made by some one of your subordinates, to enable you to testify?

A. I have not.

Q. And you have made no examination yourself?

A. I have not.

Q. And then your testimony here is neither from information from your subordinates nor from your own personal examination?

Mr. JUNKIN: I object to the question. The witness has testified of his own knowledge and has shown the source of his information in answer to each question that he has answered.

Mr. SCHOYER: I want again to object to the form of the objection, and protest against it. I repeat the question.

A. I have answered all questions to the best of my knowledge and belief.

Mr. SCHOYER: Read the question again.

Q. (The stenographer repeats the last question from his notes.)
A. I repeat the answer just as before.
Q. Do you mind stating, Mr. Searles, whether the paper of authorization to bring this suit, which you held in your hands
88 this morning, had been delivered to you or to your company before you authorized the bringing of this bill of foreclosure?

Mr. JUNKIN: I object to the question as being based upon a statement which is not shown to be true, which is entirely immaterial and irrelevant, and as misstating the witness's previous testimony.

A. I have every reason to believe it was.
Q. And upon what do you base that reason, your own personal knowledge or from information from your subordinates?
A. I don't think our counsel would have moved in the matter without our instructions—instructions which would not have been given had we not had instructions from the bondholders.
Q. But that you don't know of your own personal knowledge?
A. No.

Redirect examination by Mr. TURNER:

Q. Mr. Searles, did you personally have any knowledge whatever with regard to any request, on the part of anybody, to have your company commence this suit, or any authorization on the part of any officer of your company to counsel to begin this suit?
A. I have knowledge of written requests having been lodged with the company, with the trustee, requesting foreclosure.
Q. You have knowledge of them?
A. Yes.

W. D. SEARLES.

Subscribed and sworn to before me this 17th day of April, 1897.

THOS. F. DANIELS,
[SEAL.] *Notary Public, New York.*

89 *Testimony of James G. Beemer.*

JAMES G. BEEMER, a witness called on behalf of the complainant, having been duly sworn, testifies as follows:

Direct examination by Mr. JUNKIN:

Q. Mr. Beemer, where do you reside?
A. Yonkers, New York.
Q. Are you the owner of any of the bonds of the Pennsylvania Plate Glass Company?
A. I am.

Q. Do you represent other owners of these bonds?
A. I do.
Q. How many bonds do you own?
A. Twenty-three.
Q. Have you those bonds with you?
A. I have.
Q. Let me have those bonds.
A. (Witness produces bonds.)
Q. How many of those bonds do you represent, Mr. Beemer?
A. Twenty-three.
Q. Who are the owners of the bonds you represent?
A. Twelve are owned by Margaret L. Beemer.
Q. Is she your wife?
A. Yes.
Q. And the others?
A. Ten by Mrs. Sar-h M. Hill.

Mr. SCHOYER: Have you a power of attorney in writing to represent them?
The WITNESS: I have.
Mr. SCHOYER: Then I object to any testimony as to those bonds until that is produced.

Q. As to the twenty-five bonds of which you are the owner, can you state the numbers?
A. Twenty-three bonds.
Q. Twenty-three bonds. Can you state those numbers?
A. 241, 242, 24, 23, 244, 12, 11, 10, 9, 7, 8, 5, 6, 4, 3, 1, 2, 25, 28, 30, 29, 31 and 35.
Q. Are they all of like tenor and effect?
A. They are.
Q. State what coupons are attached to those bonds.
A. The last coupons are of January 1st, 1896.
Q. And all subsequent coupons to that date are attached to the bonds?
—. They are.
90 Q. What coupons have you that have been clipped from the bonds?
A. July, 1895.

Counsel for complainant offers in evidence bond No. 242; it being agreed that said bond shall not be marked, but that a copy of the bond shall be attached to the deposition, and shall stand as substantially a copy of each of the bonds referred to.
The following is a copy of bond No. 242:

UNITED STATES OF AMERICA, *State of Pennsylvania.*

No. 242. No. 242.

$1,000. *Pennsylvania Plate Glass Company 6 % First-mortgage Gold Bond.* $1,000.

Know all men by these presents, that the Pennsylvania Plate Glass Company is indebted and hereby promises to pay to the Farmers' Loan and Trust Company of the city of New York or bearer, one thousand dollars, in the gold coin of the United States of America, of or equivalent to the present standard of weight and fineness at the office of said Farmers' Loan and Trust Company of New York City on the first day of January, one thousand nine hundred and one, with interest from the first day of January, one thousand eight hundred and ninety-one, at the rate of six per centum per annum, payable semi-annually in like gold coin, at the office of said Farmers' Loan and Trust Company in the city of New York, on the first day of July and January in each year on the presentation and surrender of the annexed coupons as they severally mature.

$1,000.

In the case of default in the payment of the principal or of any of the said interest in accordance with the tenor hereof, the said principal and interest may become collectible in the manner and with the effect specified and set forth in the deed of trust or mortgage hereinafter mentioned.

This bond is one of the series of two hundred and fifty bonds of like amount, tenor and date, amounting in the aggregate to
91 the sum of two hundred and fifty thousand dollars, and numbered from one to two hundred and fifty, consecutively, the payment of the whole series of bonds, with the interest thereon, being equally secured by a certain deed of trust or mortgage bearing even date herewith conveying the property and franchises of the company more particularly described therein, unto the Farmers' Loan and Trust Company to which reference is hereby made, for the terms and conditions upon which this bond is issued and for the rights and remedies of the holder hereof.

This bond shall not become obligatory until it shall have been authenticated by the certificate of the Farmers' Loan and Trust Company endorsed hereon.

In witness whereof, the Pennsylvania Plate Glass Company has caused its corporate seal to be hereto fixed and the same to be signed by its president, and attested by its secretary, this first day of January, A. D. 1891.

PENNSYLVANIA PLATE GLASS COMPANY,
By C. W. POOL, *President.*

Attest:
[SEAL.] A. LIVINGSTON NORMAN, *Secretary.*"

The following is a copy of a coupon dated January 1st, 1896, attached to said bond.

"$30. Pennsylvania Plate Glass Company

will pay the bearer hereof on the first day of Jan., 1896, thirty dollars in gold coin at the office of the Farmers' Loan and Trust Company in New York city, being for six months' interest on its bond.

1 0

No. 242. GEORGE COWEN, *Treasurer.*"

(Said bond is endorsed as follows:)

Number 242, issue of $250,000. Pennsylvania Plate Glass Company, Irwin, Pa. First-mortgage 6 per cent. ten-year gold bond, $1,000. Interest payable July 1st and January 1st. Principal due Jan'y 1st, 1901.

92 The Farmers' Loan and Trust Company hereby certifies that this bond is one of the series referred to and secured in the within-mentioned mortgage or deed of trust.

THE FARMERS' LOAN AND TRUST COMPANY,
By W. D. SEARLS, *Vice-Pres't.*"

"One thousand

M $1,000 1,000 $1,000 M

Dollars.

$1,000 $1,000."

Q. Now you say that the bonds that are owned by Margaret L. Beemer and Sarah L. Hill are represented by you under a power of attorney given by these persons to you?

A. Yes.

Q. Have you that power of attorney?

A. I haven't it with me.

Q. You produce the bonds owned by these parties and represented by you?

A. I do.

Q. Give the numbers of them.

Mr. SCHOYER: I object to testimony as to any of those bonds until the power of attorney is produced.

A. Sarah M. Hill's, numbers 17, 19, 18, 16, 15, 13, 14, 22, 20 and 21; Mrs. Beemer's, numbers 27, 243, 63, 248, 33, 32, 34, 58, 62, 59, 245 and 26.

Q. Are any of these bonds registered, Mr. Beemer?

A. With the Farmers' Loan and Trust Company?

Q. I say are any of these bonds registered?

A. No.

Q. They are all negotiable to bearer?

A. Yes.

Q. Did you request the Farmers' Loan and Trust Company, as the owner and holder of the bonds which you have testified that

you own and represent, to begin proceedings for the foreclosure of the mortgage which had been put in evidence?

—. I did.

Mr. SCHOYER: Is that request in writing?

The WITNESS: It is.

93 Mr. SCHOYER: Then I object to any statement until the request is produced.

Q. (Paper shown witness.) I show you a paper. Is that the request to which you refer?

A. It is.

Q. By whom is it signed?

—. By me.

Mr. SCHOYER: Let me look at it before you say anything about it.

The paper shown witness is marked Complainant's Exhibit 4 for identification, and is handed to counsel for defendants, who examines same.

Mr. SCHOYER: I have looked at it.

Mr. JUNKIN: Complainant's Exhibit 4 for identification is offered in evidence.

Mr. SCHOYER: The offer is objected to, first, because the signature being for forty-five bonds, they do not aggregate one-third in value of the entire issue of bonds secured by the mortgage recited in the bill, and because James G. Beemer represented himself to be the owner of the entire forty-five bonds, whereas he has just declared that he owns but twenty-three.

The following is a copy of Complainant's Exhibit 4 for identification:

"JANUARY —, 1896.

To the Farmers' Loan and Trust Company:

Default has been made by the Pennsylvania Plate Glass Company on the first day of July, 1895, in the payment of the interest on the bonds secured by the mortgage of that company to your company as trustee, dated January 1st, 1891. Such default has continued for six months after demand made in writing by the trustee for the payment of such interest. The undersigned, holders of one-third in value of the bonds secured by said mortgage and then outstanding, hereby make and deliver to you their written requisition that you commence and prosecute such action, suits or proceedings, at law or

in equity, as shall be necessary to obtain a sale of the mort-

94 gaged premises, by and under judicial authority, and to bar and foreclose the equity of redemption of the mortgagor company, its successors and assigns, and of all persons claiming under them. And the undersigned hereby agree to indemnify and save you harmless from all expenses, costs, outlays, counsel fees or other disbursements which you may incur or become liable for by reason of anything that you may do in carrying out this requisition:

| Names. | Addresses. | Amount of bonds. |
|---|---|---|
| James G. Beemer. | Yonkers, N. Y. | 45." |

Q. Mr. Beemer, did you present that request to the Farmers' Loan and Trust Company?

A. I did.

Q. When was the last interest paid to you on the coupons that have matured under this mortgage?

A. January, 1895.

Q. Has any interest been paid you since then?

A. No.

Q. Have you demanded the payment of any interest since then?

A. I have.

Q. Of what interest?

A. Of July, 1895, and January, 1896.

Q. Coupons from these bonds which became due July, 1895?

A. Yes.

Q. And also coupons from these bonds which became due January 1st, 1896?

A. I did not cut the coupons, I made the demand.

Q. Where did you make the demand?

A. At the Farmers' Loan and Trust Company.

Q. When did you make the demand, in each case?

A. After the date at which the coupons became due.

Q. At or about the same time they became due?

A. At about the time.

Q. What did the Farmers' Loan and Trust Company or its representative tell you?

A. That they had no money to pay them.

95 Q. Please read from that Complainant's Exhibit 4 for identification the seventh line, beginnning at the seventh line?

Mr. SCHOYER: I object, as the paper will speak for itself, unless it is to lead up to another question.

A. (Reading:) "The undersigned, holders of one-third in value of the bonds secured by said mortgage and then outstanding."

Cross-examination.

By Mr. SCHOYER:

Q. Mr. Beemer, you say you are the owner of twenty-three bonds?

A. Yes, sir.

Q. And in this paper (referring to Complainant's Exhibit 4 for identification) you speak about being the holder of forty-five?

A. Yes, sir.

Q. And you distinguish, therefore, between being the owner and being the holder?

A. Yes, sir.

Q. There is nothing, however, on that paper to show that you are not the owner as well as the holder, is there?

A. No, sir.

Q. Did you have the letter of attorney at the time you signed that Exhibit 4 for identification?

A. I did.

Q. Why did you not then put down your own name or the number of bonds which you owned, twenty-three, and the names of the real owners, by yourself as attorney-in-fact, for the others?

A. I suppose as a matter of convenience.

Q. Well, the mortgage requires that the bonds shall be deposited with the Farmers' Loan and Trust Company at the time the writing or request is filed with them. Did you deposit those bonds with them?

Mr. JUNKIN: I object because the statement of fact with regard to what the mortgage contains is not correct.

A. (No answer.)

96 Q. I call your attention to the provision in the mortgage, being the second paragraph in article tenth, as follows: "The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee." Did you ever deposit any of the bonds which you either own or of which you were the holder, as set out in Exhibit 4 for identification, with the Farmers' Loan and Trust Company, trustee?

A. So far as——

Q. You can say yes or no, and then make an explanation afterwards.

A. I won't answer yes or no, to that. So far as your question applies to an extract from the mortgage, I can't answer it. So far as it applies to the fact as to whether I made deposit of bonds or not, I did not.

Q. You say you are the owner of twenty-three bonds?

A. I am.

Q. How did you acquire and when did you acquire that ownership?

A. I bought them for cash.

Q. From whom?

A. I decline to answer until advised by counsel whether it is necessary for me to tell my private business in this proceeding.

Q. Do you also decline to answer when you acquired them?

A. I can't give the date from memory.

Q. Have you any data which would fix your memory?

A. Not here.

Q. Did you not dispose of the bonds to Mrs. Beemer, I believe, who is your wife, and to Mrs. Sarah M. Hill; did they not acquire their title through you?

A. I decline to answer that.

Q. To whom or to what officer of the Pennsylvania Plate Glass Company did you pay cash for your bonds?

A. I decline to answer that until advised by counsel, as be-

97 fore as to whether it is proper for me to answer questions as to my own private business in this proceeding.

Q. Don't you know, Mr. Beemer, that you did not buy the bonds

from the company and pay them cash or pay any consideration to the company?

A. Yes.

Q. Do you not know that you acquired your bonds through a firm known as A. C. Boyd & Company?

A. Yes.

Q. Were you not a member of A. C. Boyd & Company?

Mr. TURNER: Did you mean to confine that to the time he bought the bonds or any time?

Mr. SCHOYER: I will by a subsequent question get the time. I want the general proposition first.

A. With the statement that I don't think it is anybody's business, I will answer that I was not, in any way.

Q. Did you have any connection with the firm of A. C. Boyd & Company?

A. I decline to answer that question because——

Q. Were you not one of the promoters?

Mr. JUNKIN: Wait a moment, and let the witness finish his answer.

Mr. SCHOYER: I thought he had finished.

(A. continued.) I decline to answer that question, because if I had any connection with the firm of A. C. Boyd, it is not material in this case, and in fact it is my private business outside of any connection with this.

Q. Were you not one of the promoters of the Pennsylvania Plate Glass Company?

A. I was not.

Q. When did you become, if you ever did become, connected with it?

A. In, I think, December, 1891, about, it may have been November.

Q. As a common stockholder and a preferred stockholder?

A. As a common stockholder.

Q. Did you acquire preferred stock also?

A. Later on.

98 Q. Were you a stockholder of the company at the time the proceedings were instituted for the increase of indebtedness of that company, resulting in the authorization for the issue of these bonds and the mortgage securing the same?

A. I think I was.

Q. Did you take part in those proceedings at that meeting?

A. I am not sure.

Q. Don't you know, sir, at the time that election for the increase of indebtedness, resulting in this issue of bonds and mortgage now in controversy, was held, that the capital stock of the company had not been paid in in cash to the treasurer of the company?

A. No.

Q. Did you make any inquiry?

A. I presume that I was informed that some portion of the capital stock had been paid in in cash.

Q. How much was paid in, according to your information?

A. I can't remember the amount, but something over $100,000.

Q. From whom did you acquire your stock directly, from the company or from some intermediate holder?

A. I acquired some stock directly from the company.

Q. And the rest from whom?

Mr. JUNKIN: I make a general objection to this line of examination.

Q. How much stock did you acquire from the company directly?

A. I can't say exactly.

Q. Well, I don't want the exact amount, but substantially the amount.

A. I subscribed for myself and others for something over $30,000 of stock, for which I paid the company in cash at par.

Q. And when was it you made that payment?

A. Within a short time after I became interested in the company.

Q. That you say was in December or November, 1891?

A. I think so.

Mr. TURNER: Can you have a memorandum made of a general objection to this line of testimony?

99 Mr. SCHOYER: Yes, certainly; with the same force and effect as if objection were taken to each question.

Q. What position, if any official position, did you occupy in the company?

A. I was one of the directors, and I think some time later I was nominally vice-president.

Q. You say something over $100,000 you had been informed was paid in?

A. Yes, sir.

Q. Don't you know that was a fake payment?

A. I do not.

Q. Don't you know that a check had been merely given and immediately checked out, without any money passing to A. C. Boyd & Company?

A. I do not.

Q. Would you recognize the signature of Mr. Cowen; he was the treasurer, wasn't he, George Cowen?

A. Yes, sir.

Q. (Paper shown witness.) I ask you to look at that——

Mr. SCHOYER: I will have that marked for identification.

The paper shown witness is marked Defendants' Exhibit A for identification.

(Q. continued.) I ask you to look at that Defendants' Exhibit A for identification, and ask you whether you do not recognize the signature of George Cowen, treasurer, to that check?

Mr. JUNKIN: I object to the question because that paper is not in

evidence and is not offered in evidence, and is entirely immaterial and irrelevant.

A. I do not. It does not look like his usual signature, as far as I know.

Q. Don't you know, sir, that every dollar of the required payment of ten per cent., under the incorporation act of Pennsylvania, was apparently paid in and immediately drawn out, so that no money in point of fact was paid in as required by law?

100 Mr. JUNKIN: I make the same objection, and I will make a motion to strike out all the testimony afterwards.

A. I do not.

Q. Do you know the signature of George Cowen?

A. I am not familiar with it.

Q. (Paper shown witness.) Would you recognize that as his signature?

A. I am not an expert in handwriting.

Q. Now I hold in my hand a statement of receipts and disbursements, treasurer's report, under date of February 5, 1891——

Mr. JUNKIN: Let the witness state what it is, if you are going to offer it in evidence.

Mr. SCHOYER: I am going to fix a date.

(Q. continued.) And I ask you to look at that paper and state whether or not you were not a member of that company as early as November 15, 1890, to the extent of $100, and whether or not on January 7, 1891, to the extent of $10,000?

Mr. JUNKIN: I object to the witness looking at any paper which is not in evidence, and to his answering a question in reference thereto which could be answered as readily if the paper were not here and not referred to.

The WITNESS: May I make a statement here?

Mr. JUNKIN: Yes.

The WITNESS: It may have been 1890, I am not sure; it was about the time of the organization of the company. I have no desire to make a mistake; this is why I hesitate.

Q. When did you become first advised of the proposed formation of the company—before or after the organization?

A. After it was organized and the plant partially erected.

Q. What did you receive from Mrs. Beemer for the bonds which she holds—or was it a present from you to her?

A. I declined to answer that question in another form be-
101 fore, because you must prove by Mrs. Beemer where she got her bonds and how she got them, and not by me.

Q. I am greatly obliged to you for the information. Well, would you mind telling what you got from Mrs. Hill, or do you make the same answer to that?

A. I have not sworn I sold the bonds to Mrs. Hill.

Q. Did you sell the bonds to Mrs. Hill or did she acquire them from you?

The WITNESS: Shall I answer, Mr. Turner?
Mr. TURNER: Well, Mr. Beemer, I am not your counsel.
Mr. SCHOYER: Put that down.

A. I decline to answer unless advised by counsel.
Q. Did you sell the bonds to Mrs. Hill or did she acquire them from you?
A. Yes; I sold them to Mrs. Hill.
Q. At what rate, at par?
A. At par.
Q. Paid for in money?
A. In cash.
Q. Did you guarantee the bonds to her?
A. I believe I did.
Q. So that practically you are either as the owner or the guarantor, the owner of twenty-three and the guarantor of Mrs. Hill's ten, and you decline to state what consideration Mrs. Beemer paid?
A. No; as long as I have stated that. Mrs. Beemer paid me in cash for the bonds.
Q. At the time she got the bonds?
A. At the time she got the bonds.
Q. You did not guarantee them to her?
A. I did not guarantee them.
Q. You were advised, were you not, of the total issue of stock and total issue of bonds of the Pennsylvania Plate Glass Company?
A. Of the total issue of stock?
Q. Yes.

Mr. JUNKIN: Fix your time.
Mr. SCHOYER: At the time the bonds were issued or authorized.

102 (Q. continued.) The capital stock was $1,000,000, wasn't it?
A. Yes.
Q. And the bonds were $250,000?
A. The bonds were $250,000.
Q. And were you not advised by the contractor, A. C. Boyd & Company, that the entire cost of the plant was but $269,000?
A. I was not.
Q. Nothing of that kind?
A. Nothing of that kind.
Q. You made no effort to find out the value of the property of which you had taken bonds, paying cash at par, the actual value?
A. I was satisfied the property was of more value than the bonds.
Q. How did you fix your knowledge of the value of the property?
A. From information gained of the value of similar plants, and from people who built such plants, and general knowledge.
Q. You then did not examine the quantity of material that went in or the cost of construction?
A. I did not.
Q. Nor were you advised by Mr. Cowen or A. C. Boyd & Company of the actual cost of construction?

A. I was advised by A. C. Boyd & Company and by Mr. Cowen and by Mr. Semmer and various other people.

Q. Of the real cost of construction?

A. Not of the real cost of construction.

Q. Now did you become the owner of the bonds before you were vice-president and director or after?

A. I can't say from memory; I think it was about the same time.

Q. When did you sell these bonds to your wife and Mrs. Hill?

A. I sold the bonds to my wife within a short time of my purchase, a few weeks.

Q. And to Mrs. Hill?

A. And to Mrs. Hill, I think about the 1st of January, 1893.

Q. 1893?

A. I think so.

Q. (Paper shown witness.) Did you ever see that paper?

A. I have seen similar papers.

103 Q. What part did you take in the preparation or circulation of that paper?

Mr. JUNKIN: Do you want to offer that paper in evidence?

Mr. SCHOYER: I don't know.

Mr. JUNKIN: I object to it as incompetent, irrelevant and immaterial and, as shown by his answer, a paper not recognized by the witness.

A. I took considerable part in it; I can't tell just what exactly I had to do with it or what I did not.

The paper last shown witness is marked Defendants' Exhibit B for identification.

Mr. JUNKIN: Do you offer that in evidence?

Mr. SCHOYER: No.

Mr. JUNKIN: On behalf of the complainant, I move to strike out all the testimony relating to the issue of stock.

Redirect examination by Mr. JUNKIN:

Q. Mr. Beemer, you purchased the bonds which you have testified you own, the twenty-three bonds, for a valuable consideration, did you not?

A. For cash.

Mr. JUNKIN: That is all.

JAMES G. BEEMER.

Subscribed and sworn to before me this 15th day of April, 1897.

THOS. F. DANIELS,

[SEAL.] *Notary Public, New York.*

Mr. SCHOYER: Any other witness?

Mr. JUNKIN: We have no other witness today.

Mr. SCHOYER: The testimony before this commissioner is then closed.

It is hereby stipulated by and between counsel for the respective parties, to be of the same force and effect as if made at the beginning

of the proceedings, that the notary is authorized to take down the depositions in shorthand and reduce the same to typewriting, and that the witnesses shall thereupon sign their respective depositions in the presence of said notary, who shall certify in his certificate that the copy he has made is an accurate transcript of his shorthand notes, and that the witnesses have signed before him.

[SEAL.] THOS. F. DANIELS,
*Notary Public.*

"*Copy of Complainant's Exhibit* 1."

"This indenture made this first day of January, one thousand eight hundred and ninety-one, between the Penn- Plate Glass Company, of Irwin, Westmoreland county, State of Pennsylvania, a corporation duly created and existing under the laws of the State of Pennsylvania, party of the first part, and the Farmers' Loan and Trust Company, — corporation created by and existing under the laws of the State of New York, located in the city of New York, party *to* the second part, witnesseth:

That whereas, said party of the first part by its board of directors have deemed it advisible to increase its indebtedness by the issue of bonds to the amount of two hundred and fifty thousand dollars, to be used toward the payment of liabilities incurred in the erection of a plate-glass works, now being erected on land of the company as hereinafter set forth; and

Whereas, a majority of the stockholders of the said party of the first part have consented to such increase of indebtedness in the manner and form as provided by the statutes of the State of Pennsylvania; and

Whereas, the board of directors of said party of the first part at a regular session thereof by a resolution duly ordained and passed, authorized and directed the president and secretary of said company to prepare and execute a series of bonds and accompanying mortgage in conformity with the consent of the stockholders of said company, and at the time appointed a committee to superintend the issue of same and to decide on the form thereof and the trustee of said mortgage; and

Whereas, said committee have determined on the issue of a series of two hundred and fifty (250) bonds, of the denomination of one thousand dollars, each numbered from one to two hundred and fifty, consecutively, dated January first, 1891, signed by the president and authenticated by the secretary of said party of the first part, with the corporate seal attached thereto, and payable in gold coin of the United States of or equivalent to the present standard of weight and fineness at the office of the Farmers' Loan and Trust Company, said company having been duly selected to act as trustee, the party of the second part, in the city of New York, ten years after date, with the coupons or interest warrants thereto attached, representing the interest to accrue thereon at the rate of six per cent. per annum, payable semi-annually on the first days of July and January in each

year in gold coin at said office of the party of the second part in the city of New York, upon the presentation and surrender of the coupons representing the several installments of interest as they respectively mature and by reference to the terms of the mortgage, to limit the remedy of the holder in case of default in the payment of principal or interest to the subjection of the property and premises to be conveyed to the payment thereof; and

Whereas, the bonds so proposed to be issued by the party of the first part, the coupons or interest warrants accompanying the same and the trustee's certificate to be endorsed on said bonds, are substantially of the following form, that is to say:

No. —. *Form of Bond.* No. —.

UNITED STATES OF AMERICA, *State of Pennsylvania.*

*Pennsylvania Plate Glass Company 6 Per Cent. First-mortgage Gold Bond.*

$1,000.

Know all men by these presents, that the Pennsylvania Plate
106 Glass Company is indebted and hereby promises to pay to the Farmers' Loan and Trust Company, of the City of New York, or bearer, one thousand dollars in the gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, at the office of said Farmers' Loan and Trust Company of New York City, on the first day of January, one thousand nine hundred and one, with interest from the first day of January, one thousand eight hundred and ninety-one, at the rate of six per centum per annum, payable semi-annually in like gold coin, at the office of said Farmers' Loan and Trust Company, in the city of New York, on the first days of July and January, in each year on the presentation and surrender of the annexed coupons as they severally mature.

In the case of default in the payment of the principal or any of the said interest in accordance with the tenor hereof, the said principal and interest may become collectible in the manner and with the effect specified and set forth in the deed of trust or mortgage hereinafter mentioned.

This bond is one of the series of two hundred and fifty bonds of like amount, tenor and date, amounting in the aggregate to the sum of two hundred and fifty thousand dollars, and numbered from one to two hundred and fifty consecutively, the payment of the whole series of bonds, with the interest thereof, being equally secured by a certain deed of trust or mortgage, bearing even date herewith, conveying the property and franchises of the company more particularly described therein, unto the Farmers' Loan and Trust Company to which reference is hereby made, for the terms and conditions upon which this bond is issued and for the rights and remedies of the holder hereof.

This bond shall not become obligatory until it shall have been

authenticated by the certificate of the Farmers' Loan and Trust Company endorsed hereon.

In witness whereof, the Pennsylvania Plate Glass Company
107 has caused its corporate seal to be hereto affixed and the same to be signed by its president and attested by its secretary, the first day of January, A. D. 1891.

PENNSYLVANIA PLATE GLASS COMPANY,
By —— ——, *President.*

Attest: —— —— *Secretary.*

(*Coupon.*)

Pennsylvania Plate Glass Company will pay the bearer hereof on the first day of —— thirty dollars in gold coin, at the office of the Farmers' Loan and Trust Company in New York city, being for six months' interest on its bond No. —.

—— ——, *Treasurer.*

The Farmers' Loan and Trust Company hereby certifies that this bond is one of the series referred to and secured in the within-mentioned mortgage or deed of trust.

THE FARMERS' LOAN AND TRUST COMPANY,
By —— ——, *Vice-President.*

Now, therefore, this indenture witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to it paid, the receipt whereof is hereby acknowledged, and in order to better secure the payment of the principal and interest of said bonds as the same shall become due and payable, according to the tenor and effect of said bonds and of the coupons or interest warrants, accompanying the same, hath granted, bargained and sold and by these presents doth grant, bargain, sell, release and convey and confirm unto said party of the second part hereto, and unto its successor or successors and assigns forever, all that certain tract of land, with the buildings and improvements thereon, situate in North Huntington township, county of Westmoreland and State of Pennsylvania, bounded and described as follows: Beginning at
108 a post on the northwest corner of Fourth street and Broadway avenue, in the town of North Irwin; thence by line of said Fourth street north 1° 18′ east, nine hundred and fifteen (915) feet to a post, thence by land of C. W. Pool north 88° 42′ west, five hundred and eighty-six (586) feet to a post; thence by same north 65° 50′ west, four hundred and two feet and six inches (402 ft. 6 in.) to a post; thence by same south 2° 57′ east four hundred and seventy-six (476) feet to a public road and line of Swigger's heirs; thence by same south 65° 50′ east, one hundred and fifteen (115) feet to a post; thence by same south 23° 10′ west, five hundred and twenty-seven (527) feet to a post on a line of Broadway avenue; thence by said avenue south 49° 42′ east, one hundred and three feet to a

post; thence by said avenue south 88° 42′ east, nine hundred and thirty-one (931) feet to a post at Fourth street, the place of beginning, containing twenty-one (21) acres, more or less.

Being a part of a tract of land called "Fruit Hill," for which a patent was issued by the Commonwealth of Pennsylvania to William Elliott, dated 2d May, 1788, and part of which land so patented became vested in C. W. Pool by deed from J. L. Ewing *et ux.*, by deed recorded in Westmoreland county aforesaid, in Deed Book 177, page 135, and being the same tract of land which the said C. W. Pool conveyed to Philip Semmer by deed dated the 16th day of June, A. D. 1890, and recorded in said county in Deed Book 184, page 410, and thereafter conveyed by said Phillip Semmer to the party of the first part hereto by deed dated the 28th day of August, 1890, and recorded in said county in Deed Book 184, page 408.

And also all the right, title and interest of said party of the first part of, in and to and arising from a certain assignment made by A. C. Boyd and Phillip Semmer, as partners composing the firm of A. C. Boyd and Company, to it, the said party of the first part, bearing date August 30, A. D. 1890, wherein and whereby, for and in consideration of one dollar, said A. C. Boyd & Company sold, assigned,
109 transferred and set over unto said party of the first part hereto, all the right, title and interest of, in and to certain contracts whereby the Irwin Natural Gas Company for certain valuable considerations contracted and obligated themselves to furnish natural gas in sufficient quantities for the successful operation of a plate-glass plant, having a capacity of three twenty-pot furnaces, with the necessary annealing ovens and appliances and all other uses necessary for the proper operation of said plant for and during the term of ten years from the 16th day of June, A. D. 1890, subject to the rules and regulations of said Irwin Natural Gas Company, the said plate-glass plant above referred to being situate on the above-described premises of the party of the first part.

And also all of the right, title and interest of the party of the first part of, in and to and arising from a certain contract now held and owned by it through mesne assignments made between C. W. Pool and Phillip Semmer bearing date the 16th day of June, A. D. 1890, wherein and whereby said C. W. Pool agreed for the sum of one dollar per annum to deliver at the property line of the premises as above set forth a sufficient quantity of water to supply all the needs of the plate-glass plant to be erected thereon for a period of three years from the 16th day of June, A. D. 1890, subject to the rules and regulations of the Irwin Water Company. Said plant referred to now being erected by party of the first part.

And also all and singular all the other property, real and personal, or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises.

Together with all and singular the tenements, hereditaments and appurtenances belonging to the said above-described premises, or

thereunto in anywise appertaining, and the reversions, re-
110 mainders, income, rents, issues and profits thereof, and also all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises and every part thereof, with the appurtenances.

To have and to hold, all and singular, the premises and property, rights and franchises, whether real or personal, or mixed, hereby conveyed, or intended so to be, with the appurtenances, unto the said The Farmers' Loan and Trust Company, the party of the second part, as trustee, and its successor, or successors or assigns.

In trust, nevertheless, for the equal and *pro rata* benefit and security of the several persons or corporations who may be or become holders of any of the bonds hereby secured, without any preference or priority of one bond over another or others, by reason of priority in the time of issue or negotiation thereof, or otherwise, and for the uses and purposes, and upon and under the terms and stipulations, hereinafter expressed and contained, that is to say:

ARTICLE FIRST. Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds thereby secured, or some of them, or in the performance of some one or more of the covenants, stipulations or agreements herein required by it to be kept, performed or done, the said party of the first part shall be suffered and permitted to possess, manage, operate and enjoy, the said hereinbefore mentioned and described plate-glass works and premises, with the appurtenances, and to take and use the incomes, rents, issues and profits thereof, and to dispose of the same in any manner not inconsistent with these presents; and the party of the first part shall also have the right, from time to time, in its discretion, to dispose of such portion or portions of the plant, machinery, implements, furniture and fixtures at any time, held or acquired for use in connection with the said plate-glass works,
111 · as may become unfit for use, replacing the same by new, which shall become subject to the operation of these presents.

ARTICLE SECOND. In case default shall be made in the payment of any installment of interest on any of the aforesaid bonds, according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement or stipulation herein contained, and hereby required to be kept and performed by the said party of the first part, and if such default should continue for the period of six months after demand, made in writing by the said trustee upon the said party of the first part, for the payment of the said moneys, or the performance of the said covenants, it shall be lawful for the said trustee, the party of the second part, or its successor or successors, personally, or by its attorneys or agents, to enter into or upon, all and singular, the premises hereby conveyed, or intended so to be, and each and every part thereof, and wholly to exclude the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said plate glass company and appurtenances,

conducting the business thereof, and enjoying the franchises pertaining thereto, making from time to time all such repairs and replacements, and such useful alterations, additions and improvements, as may seem to be necessary and judicious to carry on the business of said party of the first part and to collect and receive all incomes, rents, issues and profits of the same and every part thereof, and after deducting all the expenses of operating and of conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges of liens, prior to the lien of these presents, upon the said premises, or any part thereof, as well as a just compensation for its own services, to apply the
112 moneys arising as aforesaid to the payment of the interest on the bonds hereby secured, in the order in which the same shall have become due, ratably, to the person and corporations, who shall be the holders of the coupons representing such interests, and if after paying all interest, which shall have become due, a surplus shall remain, such surplus, and the property and premises hereby conveyed, shall be forthwith paid and surrendered to the said party of the first part, its successors or assigns, and the said mortgage premises shall be thereafter possessed and held by the said party of the first part, its successors and assigns, subject to the lien of this mortgage, and to the right of the said trustee to take possession, in case of other default, in like manner, and with the like effect, as hereinbefore specified and provided.

ARTICLE THIRD. In case default shall be made, as aforesaid, or in case default shall be made in payment of the principal of any of the said bonds, or any part thereof, and in case such default shall continue for the period of six months after demand, made in writing, by the said trustee, for the payment of the said moneys, or the performance of the covenant or covenants, it shall be also lawful for the said trustee, and upon receiving a written requisition, signed by a majority in value of the bonds secured hereby, then outstanding, with proper indemnification against costs, compensation and expenses, it shall be the duty of the said trustee, or its successor or successors, after entry as aforesaid, or other entry, or without entry, personally, or by its attorney or agent, to sell and dispose of all and singular the premises, franchises and contracts hereby conveyed and assigned or intended so to be, as an entirety, or such part or parts of the same as shall be necessary, from time to time, at public auction, in the town of Irwin aforesaid, at such time or times as the trustee may appoint, having first given notice of the time and place of such sale by advertisement containing a brief general description of the property to be sold, to be published at least
113 once a week for four consecutive weeks in one newspaper published in the city of New York, in the State of New York, in one newspaper, published in the town of Irwin, in the State of Pennsylvania, and one newspaper published in the city of Pittsburg, in the State of Pennsylvania; to adjourn such sale from time to time, in its discretion, and after such adjournment or adjournments to make the sale at the time and place to which the same shall be so ad-

journed; and at and upon the making of such sale, and upon the receipt of the purchase price of the property sold, to make and deliver to the purchaser, or purchasers, a good and sufficient deed in the law conveying the same.

Such sale, or sales, so to be made, shall be a perpetual bar, both at law and in equity, against the party of the first part, and all other persons or corporations lawfully claiming, or to claim the premises so sold, or any part or parcel thereof, by, through, from or under it; and after deducting from the proceeds of any such sale, a just allowance for all disbursements and expenses of, or incident to, such sale, including attorneys' and counsel fees, and all other expenses, advances or liabilities which have been made or incurred by the said trustee, in operating or maintaining the said plate-glass works, or in managing its business while in possession, and all payments which shall have been made by it, for taxes or assessments, or for charges or liens prior to the lien of these presents, upon the said premises, or any part thereof, to apply the said proceeds to the payment of the principal and accrued interest of such of the bonds hereby secured, as shall then be outstanding and unpaid, whether or not the same shall have become previously due, without discrimination, ratably, to the persons or corporations who shall then be the holders of said bonds, and of the coupons representing such accrued interest to the aggregate amount of the said unpaid principal and accrued interest; and if, after the satisfaction of the principal and accrued interest of all of the said bonds then out-
114 standing and unpaid, a surplus of the said proceeds shall remain, to pay over the same to the said party of the first part, or to whomsoever shall be lawfully or equitably entitled to receive the same, or as some court of competent jurisdiction shall direct.

And it is hereby declared, that the receipt or receipts of the said trustee, shall be a sufficient discharge to the purchaser or purchasers, at such sale, for the purchase-money, and that neither such purchaser or purchasers, nor his or their heirs, executors, administrators or assigns, shall be liable, after the payment thereof, to the trustee, and being in possession of such receipt or receipts therefor, for the due application of said purchase-money, or any part thereof, nor shall they or any of them be in any manner whatsoever, answerable for any loss, misapplication or non-application of such purchase-money, or any part thereof, nor be in any manner obliged to enquire into the necessity, expediency or authority of, or for such sale.

And in case default shall be made as aforesaid, and shall continue as aforesaid, it shall also be lawful, and it shall be the duty of the said trustee, and its successor or successors in the said trust upon receiving a written requisition, signed by the holders of one-third in value of the bonds hereby secured and then outstanding, after entry as aforesaid, or other entry, or without entry, to commence and prosecute such actions, suits or proceedings at law, or in equity, as shall be necessary to obtain a sale of the said premises, by and under judicial authority and to bar and foreclose the equity

of redemption of the said party of the first part, its successors and assigns, and of all persons claiming under them, or any of them, and the said premises hereby conveyed, or intended so to be, with the appurtenances, and every part and parcel thereof.

ARTICLE FOURTH. At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustees, or any other power of sale here-
115 tofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do, by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of the property be sold, or if it all be sold, at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same, or any of them may be assigned or transferred, except such suits or pro-
116 ceedings, as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less

price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding.

ARTICLE FIFTH. In case default shall be made in the payment of the semi-annual instalments of interest of any of the said bonds, according to the tenor of the said bonds and the coupons accompanying the same, and in case any such default shall continue for a period of six months after demand by said trustee, in writing, for the payment of the said moneys, the principal of the bonds secured hereby, and the said accrued interest shall, at the election of the said trustee, become immediately collectible from and out of the said mortgaged premises, anything in the said bonds, or herein contained, to the contrary notwithstanding, and the said trustee may thereupon immediately proceed to cause the said premises to be subjected to the payment of the said debt in like manner as hereinbefore provided.

But a majority in interest of the holders of the principal of said bonds then outstanding and unpaid, may, in writing, instruct the said trustee to declare the said principal and interest to be so collectible without demand for payment at, upon or after the default, as aforesaid, of the party of the first part to pay the said interest, or any part thereof; or such majority in the interest of the holders of the said bonds, may waive the right so to declare on such
117 terms and under such conditions as such majority may deem proper, or may annul or reverse such election by the trustee; provided, however, that no such action of the trustee, or the holders of the said bonds, shall extend to, or to be taken to affect any subsequent default, or to impair any of the rights or powers hereinbefore mentioned resulting therefrom.

ARTICLE SIXTH. The said party of the first part shall, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee or its successor, execute, acknowledge and deliver all such further deeds and assurances in the law, for the better assuring unto the said trustee and its successor or successors, in the trust hereby created, upon the trusts herein expressed, the premises, franchises and appurtenances hereinbefore mentioned and conveyed, or intended so to be, and all other property and thing-whatsoever appurtenant thereto, whether now acquired and held, or hereafter to be acquired, as by such trustee, its successor or successors, or their counsel learned in the law, shall be reasonably advised, *are* required.

ARTICLE SEVENTH. The said trustee, and its successors shall have full power, in their discretion, upon the written request of the said party of the first part, or its successors, to convey, by way of release or otherwise, to the person or persons designated by the party of the first part, or its successors, or to reconvey to the said party of the first part, its successors and assigns, any lands acquired in any way or held for the purpose of the business of the party of the first part, or the uses connected therewith in connection with its said business upon security satisfactory to the trustee for the protection of its *cestui que trust*.

ARTICLE EIGHTH. And it is further agreed, that whenever and as

often as any contingency shall arise in which a meeting of the holders of the bonds hereby secured shall be necessary or expedient, it shall be the duty of the trustee, or of the president of the party of the first part, on the written request of the holders
118 of not less than one-fifth in amount of the principal of the bonds then outstanding, stating therein the object of such meeting, to call a meeting of the holders of the then outstanding bonds secured hereby, to be held at some convenient place in the town of Irwin, Pennsylvania, by advertisement in at least two newspapers published in the said city of New York, the town of Irwin and the city of Pittsburg, Pennsylvania, such advertisement to be published daily in such newspapers for at least ten successive days immediately preceding the time named for such meeting. In case of the default of such trustee and of the said president to call such meeting, it shall be competent for the holders of one-fifth in amount of the bonds then outstanding, to call a meeting in the manner aforesaid; and at any such meeting so called, the holders of said bonds may attend in person or by proxy, and it shall be competent for a majority of them to exercise all the powers and privileges conferred upon the bondholders by these presents, or which may otherwise be lawfully exercised or enjoyed by them, provided, that the holders of a majority in amount of the principal of the then outstanding bonds, attending either in person or by proxy, shall be necessary to constitute a quorum at such meeting, and that any vote of such meeting affecting or intending to affect any person or corporation, including the parties hereto, or their successors, may by any person or corporation so to be affected, be required to be authenticated by the signatures of the persons so voting.

It is further agreed that in case of the resignation, incapacity, or removal of the trustee, a successor or successors may be appointed by the holders of a majority in amount of the principal of the bonds secured hereby, then outstanding, by an instrument in writing signed by them, or by the vote of any meeting called and held as hereinbefore provided, and in case such majority in amount of the holders of the said bonds do not agree upon the appointment of a new trustee, or trustees, then the party of the first part
119 hereto, is hereby authorized and empowered to apply, or if it shall neglect or refuse so to do for the period of thirty days after any vacancy shall occur, then the holders of any of the said bonds then outstanding, to the amount of fifty thousand dollars, may on notice to the party of the first part, or its successors, apply to any court of record, of competent jurisdiction, for the appointment of a new trustee or trustees; and the trustee or trustees so appointed or elected, under any of the provisions hereof, shall, on his or their acceptance of such appointment or election, thereby become invested with all the estate, rights and powers as trustee or trustees hereunder, and shall perform the same duties as he or they would have held, possessed or been invested with, or bound or obliged to perform, had he or they been made the party or parties of the second part hereto.

It is further agreed that in case any vacancy shall occur by reason of the resignation, removal, disability, neglect or refusal to act, of the said parties of the second part or either of them, at and upon the happening of such vacancy, and until the appointment of a new trustee or trustees in pursuance of the provisions hereof, C. W. Pool, Esquire, of the State of Pennsylvania, is hereby appointed and shall become the trustee hereunder, and the premises hereby conveyed, and the estate hereby granted, shall thereupon immediately vest in him, the said C. W. Pool, Esquire, and his successors in the said trust, in the place and stead of the trustee or trustees in respect to whom such vacancy shall exist, with the like effect and with the like powers and duties, to all intents and purposes, as if the said premises had been conveyed to him by these presents.

ARTICLE NINTH. If the said party of the first part shall well and truly pay the principal of the said bonds and every of them, and the interest to accrue thereon, according to the tenor and effect of the said bonds, and of the several coupons accompanying the same, and shall well and truly observe, perform and keep, all and singular, the several covenants, agreements and stipulations herein provided on its part to be observed, performed and kept, according to the true intent and meaning of these presents, then, and in that case, all the estate, right, title and interest of the said party of the second part, its successor or successors, in the trust hereby created, shall cease, determine and become void; otherwise the same shall be and remain in full force and virtue; and at and upon the payment of the said bonds hereby secured and the interest thereon, this indenture shall be discharged by the said parties of the second part, or their successor or successors, by appropriate instrument or instruments, under seal, duly executed and acknowledged.

ARTICLE TENTH. The right of action under this indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this indenture for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion; but the trustee shall be under no obligation to institute any such suit, or to take any proceedings under this indenture, or to enter any appearance or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such request or demand. The trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be

done by it as such trustee, without such indemnity, and in
121 such case it shall be compensated therefor from the trust fund.

The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in his discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion; it shall be entitled to be reimbursed — all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same; and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property and premises.

In case at any time it shall be necessary and proper for the trustee to make any investigation respecting any facts preparatory to
122 taking or not taking any action, or doing or not doing anything as such trustee, the certificate of the party of the first part, under its corporate seal, attested by the signature of its president, and the affidavit of one or more directors, shall be conclusive evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

All recitals, statements of fact and representations herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of the same; nor is the party of the second part to be understood as making any representations as to the character, extent or value of the above-described property, or as to the title thereto.

ARTICLE ELEVENTH. The said party of the second part doth hereby accept the trust hereby created.

In witness whereof, the said party of the first part, pursuant to a resolution of its board of directors hath caused this instrument to be signed by its president, and attested by its secretary, and its corporate seal hereunto affixed, and the said The Farmers' Loan and

Trust Company, under the direction and authority of its board of directors, hath caused this instrument to be signed by its president, and attested by its secretary, and its corporate seal hereunto affixed.

PENNSYLVANIA PLATE GLASS COMPANY,
By C. W. POOL, *President.*
Attest: A. LIVINGSTON NORMAN, [SEAL.]
*Secretary.*
THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON, *President.*
Attest: E. S. MARSTON, *Secretary.* [SEAL.]

Sealed and delivered in the presence of—as to Pennsylvania Plate Glass Company—
S. E. POOL.

Witness as to the Farmers' Loan and Trust Co.:
W. B. CORDOZO.

123 STATE OF PENNSYLVANIA, } ss:
*County of Westmoreland,* }

Be it remembered, that on this seventh day of January, anno Domini eighteen hundred and ninety-one, before me, a notary public, in and for the said county and State, duly commissioned and qualified, personally came C. W. Pool, the president of the Pennsylvania Plate Glass Company, and A. Livingston Norman, the secretary of the said company, to me personally known to be the persons whose names are subscribed to the foregoing instrument, as the president and secretary of the said company, and severally acknowledged the same as and for the voluntary act and deed of the said Pennsylvania Plate Glass Company, by them severally, voluntarily done and executed for the purposes therein set forth.

And the said A. Livingston Norman being by me duly sworn, did depose and say, that he resides in the county of New York and State of New York, that he is the secretary of the said Pennsylvania Plate Glass Company, that the seal affixed to the foregoing instrument as the seal of said company, is the corporate seal thereof; that it was affixed by the order of the board of directors of the said company, and that he signed his name thereto by the like order of the said board.

And the said A. Livingston Norman did then and there further depose and say, under his oath, aforesaid, that he is acquainted with the said C. W. Pool and knows him to be the president of the said company; that the signature of the said C. W. Pool subscribed to the said instrument, is the genuine handwriting of him, the said C. W. Pool, and was thereunto subscribed by the like order of the said board of directors, and in the presence of him, the said A. Livingston Norman.

In testimony whereof, I have hereunto set my hand and notarial

seal at the county and State aforesaid, the day and year above written.

ELI McCORMICK,
*Notary Public.*

[SEAL.]

124 STATE OF NEW YORK, } ss:
*City and County of New York,* }

Be it remembered, that on this eighth day of January, in the year one thousand eight hundred and ninety-one, before me, the undersigned, George H. Corey, commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, under the laws of the State of Pennsylvania, to take acknowledgments of deeds, etc., to be used or recorded therein, personally appeared Roswell G. Rolston, the president of the Farmers' Loan and Trust Company, and Edwin S. Marston, the secretary of said company, to me personally known to be the persons whose names are subscribed to the annexed instrument, as the president and secretary of said company, and severally acknowledged the same as the free and voluntary act and deed of said The Farmers' Loan and Trust Company, by them severally and voluntarily done and executed, for the purposes therein set forth. And said Edwin S. Marston being by me duly sworn, did depose and say that he resides in the city of Brooklyn, county of Kings and State of New York. That he is the secretary of the Farmers' Loan and Trust Company. That the seal affixed to the foregoing instrument as the seal of said company, is the corporate seal thereof. That it was affixed by the order of the board of directors of said company, and that he signed his name thereto by like order of said board.

And the said Edwin S. Marston did then and there further depose and say, under his oath aforesaid, that he is acquainted with said Roswell G. Rolston and knows him to be the president of said company. That the signature of the said Roswell G. Rolston subscribed to the said instrument, is the genuine handwriting of him, the said Roswell G. Rolston and was thereunder subscribed by the like order of said board of directors, and in presence of him, the said Edwin S. Marston.

125 In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.]

GEO. H. COREY,
*Commissioner for the State of Pennsylvania.*

STATE OF PENNSYLVANIA, } ss:
*Westmoreland County,* }

Recorded on this 12th day of January, A. D. 1891, in the recorder's office of said county, in Mortgage Book 43, page 1, &c.

Given under my hand and the seal of the said office the date above written.

[SEAL.] WILLIAM B. CONWAY, *Recorder.*"

(Endorsement:)
65. 6.50 p. m.
No. 1108.

Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company. Mortgage. Jan. 12, 1891, 5.50 p. m. Tax and fees, $10.00.
Paid.

T. M. & R.

[SEAL.] THOMAS F. DANIELS,
*Notary Public.*

And now, July 16th, 1897, in pursuance of notice and agreement of counsel, S. S-hoyer, Jr., Esq., appearing for defendants, and E. G. Ferguson, Esq., for complainant, met for the purpose of taking testimony on part of the complainant, and at the request of E. G. Ferguson, Esq., adjourned until Tuesday, July 20th, 1897, at 10 a. m.
H. D. GAMBLE, *Examiner.*

July 20th, 1897, met pursuant to adjournment—present, counsel as before—and at the instance of E. G. Ferguson, Esq., is further adjourned until tomorrow, July 21st, 1897, at 10.30 a. m.
H. D. GAMBLE, *Examiner.*

126 And now, July 21st, 1897, met pursuant to adjournment—present, E. G. Ferguson, Esq., for complainant, and S. Schoyer, Jr., Esq., for defendants—and complainant's counsel stating that he is unable to proceed on account of the absence of J. S. Ferguson, Esq., defendant's counsel states that the three months allowed by rule of court for the taking of testimony having expired he will object to any further testimony being taken unless by permission of the court.

H. D. GAMBLE, *Examiner.*

And now, July 27th, 1897—J. S. Ferguson, Esq., appearing for the complainant and S. Schoyer, Jr., Esq., for defendant—the last objection as to any further testimony being taken except by the permission of the court is now waived by defendants' counsel for the present.

Complainant's counsel offers in evidence the bill of complaint in so far as the same is not controverted by the answer. And specifies that the citizenship and incorporation of the plaintiff and its powers as specified in the mortgage. 2nd. The incorporation as averred in the bill of the incorporation of the Pennsylvania Plate Glass Company and the Penn Plate Glass Company and the citizenship of W. L. Kann and his residence within the western district of Pennsylvania, and the principal place of business of the Pennsylvania Plate Glass Company and the Penn Plate Glass Company, being in said western district of Pennsylvania. 3rd. The execution and record of the mortgage annexed to the bill, and the acceptance of the trust thereby created by the plaintiff. This admission not to

preclude the defenses set up touching the validity of the mortgage and the defenses set up in the answer. The averments of the eleventh paragraph of the bill are admitted.

The defendant admits and waives the necessity of proof upon the part of the complainant that there was served upon W. L.
127 Kann, Esq., treasurer of Pennsylvania Plate Glass Company, and upon W. L. Kann, owner of the works of the Pennsylvania Plate Glass Company, as follows:

"Take notice that the Farmers' Loan and Trust Company, trustee under the mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company, dated January 1st, 1891, to secure a series of bonds hereby makes demand of you in writing for the payment of the interest monies due on the bonds secured by the said mortgage being in the aggregate the sum of seven thousand five hundred dollars, the amount of the coupons on two hundred and fifty bonds of one thousand dollars each being all the said bonds, which interest coupons became due on the first day of July, 1895.

FARMERS' LOAN AND TRUST CO.,
By WM. H. LEUTT,
*Second Vice-President.* [SEAL.]

Attest: E. S. MARSTEN, *Secretary.*"

It is also admitted that a similar notice in corresponding terms, except that said similar notice relates to interest coupons becoming due on the first day of January, 1896, and duly signed by the proper officers of the Farmers' Loan and Trust Company, trustee as aforesaid, was served upon the Plate Glass Company, and upon Joseph W. Stoner, Esq., receiver of the Pennsylvania Plate Glass Company, and upon W. L. Kann, Esq., president of the Penn Plate Glass Company, and W. L. Kann, Esq., personally, and that a copy thereof was received by W. L. Kann, treasurer of the Pennsylvania Plate Glass Company, directed to the Pennsylvania Plate Glass Company, and that all of said notices and demands were duly served more than six months before the filing of the bill in this cause, and that none of the interest coupons covered by the said demand have been paid to the Farmers' Loan and Trust Company in accordance with said demands.

Complainant's counsel offers the averment in the twelfth paragraph of the bill as not denied which is as follows:
128 "And your orator has elected that the principal of the said bonds secured by said mortgage and the said accrued interest thereon shall be collectible from and out of the said mortgaged premises."

The defendant objects to the last foregoing offer of the plaintiff by stating that the answer, by its true intent and meaning, denies any right or power in the plaintiff to make said election by reason of noncompliance with the limitations or conditions of the said mortgage or deed of trust, and had no power to make such election under the terms thereof.

Complainant's counsel offers an exemplification of the record of the court of common pleas of Westmoreland county at No. 265 in equity, equity docket, between George Cowan *et al.*, complainants, and The Pennsylvania Plate Glass Company, defendant.

Complainants rest.

*Defendant's Testimony.*

And now to wit, September 27th, 1897, in pursuance of notice the taking of depositions on part of defendant is proceeded with, S. Schoyer, Jr., appearing for the defendants, W. L. Kann and Penn Plate Glass Company; and J. S. Ferguson, Esq., for complainant.

And now September 28th, 1897, met pursuant to adjournment; present counsel as before.

Mr. Schoyer calls JOSEPH W. STONER as a witness who was duly sworn (under objection).

Q. 1. Mr. Stoner, did you ever have any official connection with the Pennsylvania Plate Glass Company?

A. I did.

Q. 2. State when that connection commenced and when it terminated?

A. Well, I think about 1891 and it is still in existence as a director.

Q. 3. What office did you hold, if any?

A. I was a director, secretary, treasurer and vice-president during my connection with the company.

129 Q. 4. Give the order and dates of these different offices?

A. I was vice-president in '91, secretary in '92 I believe, and treasurer in 1893.

Q. 5. And director for how long?

A. Four years. From '91 during its active operation.

Q. 6. Are you familiar with the books kept by the company?

A. In a general way, yes.

Q. 7. Counsel now hands to witness a book with the printed words "Records," and on the fly-sheet "Minute Book of the Pennsylvania Plate Glass Company" and identified as Exhibit No. 1 and asks him whether he recognizes this book as the official minute book of the Pennsylvania Plate Glass Company?

A. I think this is part of it in my own handwriting.

Q. 8. What is the first entry on the book?

A. August 30, 1890.

Q. 9. What is the last entry?

A. March 14th, 1894.

Q. 10. During the time of your official connection with the Pennsylvania Plate Glass Co. you may state whether or not that book was recognized as the official minute book of that company?

A. It was.

Q. 11. Counsel for defendant now hands to the witness a ledger

marked Def'ts' Exhibit No. 2 and asks him whether or not he recognizes this book as an official book of the company?

A. I do.

Q. 12. What is it?

A. Common stock ledger.

Q. 13. Was or was not this book recognized by the officers of the Pennsylvania Plate Glass Company as an official stock ledger of the company?

A. It was; in which all transfers of common stock were recorded.

Q. 14. Mr. Schoyer now hands to the witness a book identified as Def'ts' Exhibit No. 3 and asks him whether he recognizes that book as an official book of the Pennsylvania Plate Glass Company?

A. I do. This is the preferred ledger.

130 Q. 15. Mr. Schoyer hands the witness a book identified as Defendants' Exhibit No. 4 and asks him whether he recognizes that book as an official book of the Pennsylvania Plate Glass Company, and if he says he does, describe the book?

A. I do recognize it. It is a duplicate of the common stock book which was kept in the office at Irwin, Pa. The other book No. 2 being kept by the treasurer in New York city.

Q. 16. Who then was the treasurer?

A. George Cowen.

Q. 17. Where did the treasurer live and where does he now live at the present time?

A. In New York city.

Q. 18. Mr. Schoyer hands the witness Exhibit No. 5 and asks him if he recognizes this book as an official book of the Pennsylvania Plate Glass Company?

A. I do. It is the common stock certificate book, and contains cancelled stocks and the outstanding stocks.

Q. 19. Mr. Schoyer hands the witness also Exhibit No. 6 and asks him whether he recognizes that as an official book of the Pennsylvania Plate Glass Company?

A. I do. As the preferred certificate book of the preferred stock.

Q. 19½. You can state whether or not the books that have been recognized by you and identified as Exhibits 1 to Exhibits 6 both inclusive were or were not recognized and used by the officers of the Pennsylvania Plate Glass Company?

(Objected to as incompetent and irrelevant, and further that the witness has not shown any competent or sufficient knowledge to enable him to testify as to the alleged character of the books, if it be material.)

Q. 20. In which, if any of those books, did you officially make entries?

A. More particularly as secretary in the minute book.

Q. 21. Please state whether or not your official duties required you to have reference to the other books identified by you?

A. They did.

131 Q. 22. State also whether or not you have seen these various

books examined, referred to and inspected by the directors at their meetings and otherwise.

A. I have.

Cross-examination by Mr. FERGUSON:

X Q. 23. When did you become secretary of the Pennsylvania Plate Glass Company?

A. The actual date I can't remember. I can tell from the book. (Witness refers to the book and says:) On October 5th, 1893, I was elected secretary of the Pennsylvania Plate Glass Company.

X Q. 24. When did you cease to be secretary of that company?

A. As an official of the old company I am still secretary. I continued to be active secretary until the last minute, recorded in this book Exhibit No. 1, under date of March 14, 1894, pages 159 and 160.

X Q. 25. From that date on did you personally record any minutes at all?

A. No. There are no records. Witness explains, understanding now that the question relates from Oct. 5th, 1893, to March 14, 1894, and answers as follows: Oct. 5, 1893, is in my handwriting. January 10, 1894, January 31, 1894, February 6, 1894.

X Q. 27. Who transcribed the minutes during your term as secretary which are not in your handwriting?

A. Mr. W. T. Zell by my instructions, head book-keeper.

X Q. 28. How long usually after the meeting did he transcribe them?

(Objected to by Mr. Schoyer as not proper cross-examination, the witness having been called only to identify the Exhibits Nos. 1 to 6, both inclusive, as official books of the company.)

A. Those minutes were taken by me in pencil and held until the next meeting. They were read and approved and then handed to Mr. Zell to transcribe in the book.

Witness'es attention being directed to minutes of Feb. 14th and March 14th, 1894, says he believes those minutes to be in the handwriting of Mr. Frank Boyd, one of the assistants.

132 X Q. 29. Did you have access to the common stock ledger, Exhibit No. 2?

A. Yes, sir; I did.

X Q. 30. Is any part of it in your handwriting?

A. I think not.

X Q. 31. Wasn't it kept all the time in New York?

A. No, sir.

X Q. 32. When and how id you come to see it?

A. Mr. George Cowen as treasurer, attending the monthly meetings as a director usually brought the books with him to the main office for reference.

X Q. 33. Is any part of Exhibit No. 3 in your handwriting?

A. No, sir.

X Q. 34. That book was also kept in New York, wasn't it?
A. Well, it was kept in both places. Some time at Irwin and some time at New York.
X Q. 35. In whose handwriting is this?
A. Mr. W. T. Zell, head book-keeper.
X Q. 36. Is any part of Exhibit No. 4 in your handwriting?
A. No, I think not.
X Q. 37. In whose handwriting is it?
A. Mr. Zell's.
X Q. 38. When did you become treasurer of the Pennsylvania Plate Glass Company?
A. October 5th, 1893, and continued until January 10, 1894.
X Q. 39. Looking at Exhibits Nos. 5 and 6 does your handwriting occur in either of those exhibits in any place except where you signed the certificates as treasurer during the period of your treasurership?
A. I think not.

Redirect examination:

Q. 40. During your term as treasurer such entries as made were made by whom?
A. Mr. Zell, head book-keeper.
Q. 41. I wish you would look at Exhibit No. 1 (question withdrawn).

Adjourned to meet Sept. 29, 1897, at 3 p. m.
And now September 29th, 1897, met pursuant to adjournment.
Counsel present as before.
133 Mr. Schoyer offers the corporation laws of Pennsylvania approved April 29, 1874. Pamphlet Laws, 73, and supplements thereto.
And he especially offers that portion of the third section of the 29th of April, 1874. Pamphlet Laws, 75.
(Objected to by counsel for complainant as incompetent, irrelevant and not relating to any defence which the answering defendants have a right to interpose.)
Attention is called by counsel for complainant to the fact that under the act of 1885 of Pennsylvania the existence of a corporation is conclusively presumed unless denied by the pleadings.
Mr. Schoyer also offers the first section of the act of the General Assembly of the Commonwealth of Pennsylvania, approved the 21st day of May, 1889. Pamphlet Laws, 257.
Printed as *placitum* 94, page 422, Purdon's Digest, edition 1894.
And Mr. Schoyer also offers the acts hereinbefore offered for the purpose of showing that the Pennsylvania Plate Glass Company is not included in clauses four, five, six, seven, nine and eleven of corporations for profit as aforesaid, nor in such corporations as belong to the class named in clause 24, section 2 of the act of assembly, approved April 17, 1876, and referred to in the act of 21st of May, 1889.

Mr. Schoyer also offers so much of the act of the 18th of April, 1874, as prescribes the form and procedure necessary to be followed and pursued by corporations for profit for increase of capital or indebtedness.

The foregoing offer as a whole and each of its parts is objected to by counsel for complainant: First, because no issue is raised in this case as to the formality of the execution of the mortgage or formal compl*ai*nance with the requirements of the statutes; second, so far as the answering defendants are concerned the offer in whole
134 and in detail is incompetent and irrelevant; third, because the answering defendants have set up no defence to the mortgage sufficient in law or in equity to defeat the bill or any portion of it.

Mr. Schoyer also offers that portion of the said act of 29th of April, 1874, as relates to companies incorporated under the said act for the carrying on of any mechanical, mining, quarrying, manufacturing or other business as provided in clause 18 of the second class in section 2 thereof, the said act being section 39, Pamphlet Laws, 101, and printed in Purdon's Digest, second volume, 1291 and 1292.

(Objected to as incompetent and irrelevant under the pleadings in this case.)

Mr. Schoyer for the purpose of showing by proof proposed to be given and by other witnesses and testimony a non-compliance by the Pennsylvania Plate Glass Company with the several requirements contained in the aforesaid recited act, offers a certified copy of the application for incorporation of the Pennsylvania Plate Glass Company dated the 1st day of August, 1890, approved by the governor of Pennsylvania August 26, 1890, enrolled in Charter Book, office of the secretary of the Commonwealth, No. 34, page 12, on the 26th of August, 1890. Certified by Charles W. Stone, secretary of the Commonwealth, under the seal of his office. Recorded on the 6th day of September, 1890, in the recorder's office of Westmoreland county, Pennsylvania, in Corporation Book 3, page 198, and certified by Christ Cribbs, recorder, under his official seal. And especially that part of the said application under clause 5th giving the names and residences of the subscribers to the capital stock and the number of shares subscribed by each.

| | |
|---|---|
| 1. Ray E. Davis, New York city | 3,887 |
| 2. A. Livingston Norman, N. Y. city | 10 |
| 3. Daniel Harrison, Pittsburg, Pa | 1,226 |
| 4. F. Y. Clopper, Greensburg, Pa | 50 |
| 5. C. W. Pool, Irwin, Pa | 100 |
| 6. Thos. McKie, N. Y. city | 4,717 |
| 7. John A. Norman, N. Y. city | 10 |

135 aggregating ten thousand shares of the par value of $100 each; also that part of the said application contained in clause 7 thereof, that the amount of the capital stock of this corporation is 1,000,000 dollars divided in- 10,000 shares of the par value of 100 dollars, and 100,000 dollars being ten per centum of the capital

stock, has been paid in cash to the treasurer of said corporation George Cowen, New York city, State of New York.

And also the affidavit annexed thereto, as follows:

STATE OF PENNSYLVANIA, } ss:
*County of Westmoreland,* }

Personally appeared before me this first day of August, A. D. 1890, F. Y. Clopper, C. W. Pool and Daniel Harrison, who being duly sworn according to law depose and say that the statements contained in the foregoing instrument are true.

(Signed) F. Y. CLOPPER.
C. W. POOL.
DANIEL HARRISON.

Sworn and subscribed before me the day and year aforesaid.
CHRIST CRIBBS, *Recorder.*

And also offers the original thereof identified as Defendants' Exhibit No. 7.

These offers are objected to as incompetent, irrelevant so far as the answering defendants are concerned.

Mr. Schoyer also offers for the purpose of contradicting the averment of the application for incorporation marked Def'ts' Ex. No. 7 so far as the same relates to the owners of the stock and the averment that one hundred thousand dollars in cash has been paid to the treasurer of the Pennsylvania Plate Glass Company, George Cowen, the minutes of the Pennsylvania Plate Glass Company of August 30th, 1890, which are *inter alia* as follows, as appearing on Exhibit No. 1 minute book:

"Mr. Norman offers the following resolution:

"Whereas the firm of A. C. Boyd are the owners and holders of certain lands, contracts and franchises, to wit, twenty-one acres of land more or less at North Irwin, North Huntington county, Westmoreland county, State of Pennsylvania; a contract with the
136 Irwin Natural Gas Company whereby said company covenants and agrees to furnish natural gas in sufficient quantities to operate a plate-glass plant having a capacity of three twenty-pot furnaces with the necessary ovens and appurtenances for ten years from June 16, 1890, and a contract with C. W. Pool whereby said Pool covenants and agrees to furnish all the water required to operate the plant above referred to, and certain improvements in grinding and annealing plate glass.

"Whereas the said firm of A. C. Boyd & Co. are now erecting a plate-glass plant on the 21 acres of land above set forth having a capacity of three twenty-pot furnaces with the annealing ovens and appliances incident and necessary to an output of 1,250,000 square feet of plate glass more or less and the rights to use certain improvements in grinding and annealing plate glass, and

"Whereas, said land, franchise and plate-glass plant are necessary for the use of this company for the business for which it was incor-

porated and organized to carry on and it desires to purchase the same for use in said business, and

"Whereas, the said firm of A. C. Boyd and Company are ready and willing to sell, assign and set over unto this company for the consideration of 850,000 dollars to be paid as hereinafter provided, the lands, contracts and franchises as above set forth, and to finish and complete for operation the said plate-glass plant by the first of July, 1891, and

"Whereas the directors of said company consider said purchase price of 850,000 dollars the fair and reasonable value thereof: Now, therefore, be it

"Resolved, That this company purchase from A. C. Boyd & Company said 21 acres of land, more or less, the interest in and benefit arising from the contract with the Irwin Natural Gas Company and with C. W. Pool for water supply and to purchase the plate-glass plant now being erected by said firm of A. C. Boyd & Company at North Irwin, and to pay the same as follows: And the right
137 to use certain improvements now controlled by A. C. Boyd & Co. for grinding and annealing plate glass.

"One hundred thousand dollars in cash and one hundred and fifty thousand dollars in stock on delivery of deeds, contract, franchises, etc."

And after providing for cash payments to the amount of 400,000 dollars, resolutions provided for the payment of 50,000 in stock when steam boilers, pumps are delivered and set up; 50,000 dollars in stock when all steam and gas pipes necessary to operate a plant are made complete; 100,000 dollars in stock on delivery of works complete ready for operation to this company.

"And be it further

"Resolved, That the officers of this company, and they are hereby fully authorized and empowered to do every act and thing requisite and necessary to complete said several purchases, and to issue such stock as from time to time may or shall be necessary to make the required payments.

"Seconded by Mr. McKie.

"Carried unanimously."

(Objected to as incompetent and irrelevant.)

Mr. Schoyer also offers a certified copy under the seal of the secretary of the Commonwealth, dated July 15, 1895, of the certificate of the Pennsylvania Plate Glass Company, entitled "Election return and waiver increase of indebtedness." Filed in the office of the secretary of the Commonwealth on the 15th day of December, A. D. 1890, especially that part of the said certificate which recites as follows:

"We, the undersigned being the holders of 10,000 shares of the capital stock of the Pennsylvania Plate Glass Company to the amounts set opposite our respective names do hereby waive notice by advertisement or otherwise of the meeting of the stockholders of the said company to be held at their office in Irwin, Pa., on November 15th, A. D. 1890, to take action on or disapproval of the proposed increase of the indebtedness of the said company — $250,000,
138 and agree that the said meeting shall take place for the said purpose on the said day.

| Signatures. | Shares. |
|---|---|
| A. Livingston Norman | 10 |
| John A. Norman | 10 |
| A. C. Boyd & Co | 1,500 |
| J. G. Beamer | 50 |
| George Cowen | 1 |
| Wray E. Davis | 7,052 |
| C. W. Pool | 100 |
| F. Y. Clopper | 50 |
| George F. Huff | 1 |
| Daniel Harrison | 726 |
| | 10,000" |

Also the affidavit of George Cowen upon part of said certificate.

"I George Cowen, treasurer of the Pennsylvania Plate Glass Company, being duly sworn, do depose and say that I am the treasurer of the said company; that the stock ledger of said company is in my custody and under my control, and that the list of stockholders given in the above waiver of notice of a meeting to vote for or against an increase of indebt-ness is a complete list of such stockholders, and that they are the owners of the entire issue of the said stock of said company, and that the signatures to said waiver are genuine and in the proper handwriting of the subscribers."

Also the statement of George Cowen, treasurer, therein contained, to the judges of election, as follows:

"First. That the capital stock of the said company is fixed at 10,000 shares of the par value of $100 each; that $1,000,000 in value of said stock has been subscribed for, and that the names of 139 the persons or bodies corporate holding said stock and the number of shares by each respectively held on this 15th day of November, 1890, are as follows:

| Name. | No. shares. | Transferred within 60 days. |
|---|---|---|
| A. Livingston Norman | 10 | |
| John A. Norman | 10 | |
| A. C. Boyd & Co | 1,500 | |
| A. G. Beamer | 50 | 50 |
| George Cowen | 1 | |
| Wray E. Davis | 7,052 | 3,217 |
| C. W. Pool | 100 | |
| George F. Huff | 1 | 1 |
| Daniel Harrison | 1,226 | |
| F. Y. Clopper | 50 | |

"Witness my hand this 15th day of November, A. D. 1890.

"[CORPORATE SEAL.] GEORGE COWEN, *Treasurer*."

Also the return of the judges, showing that there were voted in favor of the issue of $250,000 in bonds 6,732 shares, and against said increase no shares.

Also a note contained in said certificate as follows:

"NOTE.—The remaining 3,268 shares were represented at above meeting, but could not vote, the stock having been acquired within sixty days."

Also the date of filing the said certificate in the office of the secretary of the Commonwealth on November 15, 1890, said certificate being identified as Ex. No. 8.

(Objected to as incompetent and irrelevant, and particularly as not the basis for any defense to which the answering defendants are entitled.)

Adjourned till Tuesday, October 5, 1897, at 2 p. m., subject to the engagements of counsel.

And now, October 5th, 1897, the taking of further testimony, at the request of counsel, is adjourned until Friday, October 8th, at 2 p. m.

140 OCTOBER 8TH, 1897.

Met pursuant to adjournment.

Present: Counsel as before.

Mr. Schoyer offers page 22 of the Minute Book:

"At a special meeting of the stockholders of this company held at Irwin, Nov. 15, 1890, an issue of 250,000 dollars of bonds were authorized by said stockholders."

Mr. Schoyer offers the foregoing for the purpose of showing that the meeting of the stockholders recited in the said certificate *do* not appear upon the minute book of the company, the Pennsylvania Plate Glass Company.

(Objected to as incompetent, irrelevant for the purpose stated and generally as incompetent and irrelevant for the purpose of forming a basis for any defence on the part of the answering defendants.)

Mr. Schoyer also offers the minute book of the Pennsylvania Plate Glass Company, Def'ts' Ex. No. 1, page 23, of the special meeting of the board of directors held Nov. 15, 1890, before the stockholders' meeting and reassembling after the said special meeting of the stockholders and the following resolution:

Mr. Norman offers the following resolution:

"Resolved, That the action of the stockholders' meeting authorizing the directors of the company to increase its indebtedness by the issue of bonds to the amount of 250,000 dollars to be secured by a mortgage on the property of the company be accepted; that the president and secretary be authorized and directed to execute bonds and mortgage, and that Messrs. Pool, Beamer and Norman be appointed as a finance committee to superintend the issue of said bonds and decide on form and trustee of same."

This for the purpose of connecting James G. Beamer with the Pennsylvania Plate Glass Company prior to the proceedings for the issue of bonds.

And for the same purpose offers the common stock ledger of the

Pennsylvania Plate Glass Company account of J. G. Beamer,
141 page 30, Exhibit No. 2, showing that on the 5th day of November he held certificate No. 65 by way of assignment from date of subscription.

(Objected to as in last objection.)

Mr. Schoyer, for the purpose of showing that the persons named in the said certificate for increase of indebtedness, as shareholders, were not, in point of fact, on the 15th day of November, 1890, such shareholders, offers the common stock ledger, Ex. No. 2, page 26, account of Wray E. Davis, to show that he held by transfer of that date but 1,001 shares instead of 7,052 shares. Notwithstanding the certificate of the treasurer, George Cowen, averring that the stock ledger of that company was in his custody and under his control, and that the list of stockholders given in the above waiver of notice of a meeting to be held to vote for or against an increase of indebtedness, is a complete list of such stockholders and that the owners to the entire issue of the stock of said company and that the signature to said waiver are genuine and in proper handwriting of the subscribers, which statement is verified by the affidavit of the said George Cowen, treasurer, on the 15th day of November, 1890.

And in the same connection offers again the account of J. G Beamer under date of November 5th, 1890, in said common stock ledger, page 30, to show that the said J. G. Beamer was at that time entered on the stock ledger as a stockholder.

And also the account of A. C. Boyd and Company page 1, common stock ledger, Ex. No. 1, showing that on Aug. 30, 1890, A. C. Boyd & Co. was the owner by transfer from the Pennsylvania Plate Glass Company of certificate No. 1 for 1,500 shares; that on September 2, 1890, the same were subdivided into lots of hundreds, fifties, twenty-fives. Also the account of George Cowen, page 12, Ex. No. 2, under date of Aug. 30, 1890, of one share and on Nov. 10, 1890, of one share. Also the account of F. Y. Clopper, page 16, common
142 stock ledger, Ex. No. 2, to show that on Aug. 30, 1890, he was the holder of certificate 38 for one share and certificate 92 for forty-nine shares. Also the account of Daniel Harrison on page 18 of the same exhibit, that on the 30th of Aug., 1890, he was the holder of certificate 39 for one share and page 20 of the same exhibit account of C. W. Pool to show that he had certificate No. 40 for one share. Account of John A. Norman, page 22, that he was the holder of certificate 41 for one share. On page 24 of the same A. Livingstone Norman on the 30th of Aug., 1890, was the holder of 10 shares, And page 28 of the same to show that Thomas McKie on Aug. 30. 1890, was the holder of certificate 44 for one share. The account of Geo. F. Huff, page 32 of the same that on Nov. 5, 1890, he held certificate 66 for one share.

(Objected to generally for the reasons stated in the last objection, and for the further reason that the stock ledger referred to evidently does not contain a full statement of all of the stock held by the parties referred to in the offer in the Pennsylvania Plate Glass Company. For instance the account of Wray E. Davis on page 26 apparently shows that on Aug. 30, 1890, that he held 1,001 shares while

the account called treasury stock, page 34, shows a release to Wray E. Davis from 6,050 shares, dated according to the entry Dec. 18. The account of Daniel Harrison on page 18 shows a credit to him of 1 share, his subscription according to the articles of association Ex. No. 7 was for 1,236 shares; the treasury stock page 34 Ex. No. 2 shows a release of Harrison from 1,235 shares. And so far as the offers bear upon the date of the stock stated it does not tend to contradict the certificates of the treasurer because, taking the articles of the association, the stock ledger, and the certificate book showing the issued certificates, the certificate of the treasurer as to the ownership of the stock at the meeting referred to was correct.)

143 Mr. Schoyer also offers the stock common stock ledger for the purpose of showing that at the date of the organization of the said company no stock stood to the credit of the alleged subscribers of stock nor at any subsequent date until December 18th, 1890, as for instance, that no stock stood upon the books aforesaid being Exhibit No. 2 in the name of Wray E. Davis until the 30th of Aug., 1890, and then only to the extent of 1,001 shares instead of 3,887 shares as represented in the articles of association Ex. No. 7.

That A. Livingston Norman appeared upon said book as the owner of 10 shares on the 30th of Aug., 1890, page 24 of Ex. No. 2.

That Daniel Harrison, page 18, of Ex. No. 2, did not at any time appear to be the owner of 1,226 shares as represented in said articles of association, Def'ts' Exhibit 7, and does not appear as stockholder until August 30, 1890, as the holder of one share.

That the account of F. Y. Clopper on Ex. No. 2, p. 16, fails to show his holding of 50 shares as averred in articles of association at the date of said articles, and that on Aug. 30, 1890, he held but one share.

That the account of C. W. Pool, page 20, Ex. No. 2, common stock ledger, showed that on Aug. 30, 1890, he held but one share in contradiction of the averment of Def'ts' Ex. 7, articles of association, that at its date he held 100 shares.

That the account of Thos. McKie shows that he only held at any time 1 share, and that under date of Aug. 30, 1890, when the articles of association, Ex. 7, shows that he held or had subscribed for 4,717 shares.

That the account of John A. Norman, page 22, Ex. No. 2, shows that he only owned at any time one share and that on the date of Aug. 30, 1890, notwithstanding the said articles of association, Def'ts' Ex. No. 7, represents him to be the holder of 10 shares.

(Objection renewed as above.)

144 Calling attention to Def'ts' Exhibit No. 8, being certificate filed for increase of indebtedness to the date of the filing of the same in the office of the secretary of the Commonwealth on the 15th day of Dec., 1890, Mr. Schoyer offers the minutes of Dec. 18, 1890, page 26, of the Minute Book Def'ts' Ex. No. 1, especially the said meeting being held three days after the filing of the said certificate of indebtedness increase, filed in the office of the secretary of the Commonwealth, and especially the following extracts therefrom:

"The secretary read a communication from Wray E. Davis, Esq., and also one from Daniel Harrison, wherein said gentlemen ask to be relieved from a stated part of their subscriptions respectively, owing to stringency of the money market, to wit, 6,050 shares and 1,225 shares.

"Mr. Norman offers following resolutions:

"Whereas, Wray E. Davis and Daniel Harrison desire to be relieved from a part of their subscription to the capital stock of this company to the extent of 6,050 shares and 1,225 shares respectively; and,

"Whereas, in the opinion of the directors of the company the stock covered by the subscription from which relief is sought, as above, can be used for the benefit and interest of this company: now, therefore, be it

"Resolved, That Wray E. Davis be relieved from his subscription to the capital stock to the extent of 6,050 shares and that Daniel Harrison be relieved from his subscription to the capital stock to the extent of 1,225 shares, and that the said stock shall be returned to the treasury of the company to be used for the best interests of the company, and that the same shall be issued at such time and in such quantities as the financial needs of the company will require it and that the secretary be and he is hereby authorized and instructed to notify said Davis and Harrison of the above action.

"Seconded by Mr. Clopper.

"Carried unanimously."

145 And Mr. Schoyer also offers the account called treasury stock, page 34, common stock ledger, Def'ts' Ex. No. 2, showing that on Dec. 18, 1890, the treasury stock of the Pennsylvania Plate Glass Company stood indebted to Wray E. Davis release 6,050 shares, and on the same date to Daniel Harrison 1,225 shares, constituting 7,275 shares in the treasury of the company unsold and undisposed of and leaving apparently issued only the sum of 2,725 shares, aggregating at par $272,500.

And in the same connection, and for the same purpose the second account of Wray E. Davis on Ex. No. 2, common stock ledger, page 232, showing that on Aug. 30, 1890, he had sold certificate No. 2 for one share to George Cowen, and that on the same date he had assigned for cash, certificate 43 for one share and certificates 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, each for 50 shares and each for $5,000, and that on Nov. 5th, 1890, he had assigned to J. G. Beamer, without certificate number, and to Geo. F. Huff certificate No. 66 for one share; that on Nov. 10, 1890, he is charged with an assignment from the estate of Thomas McKie with 3,216 shares, and the following entry without date is made:

"By return to P. P. Glass Company, treasurer, 6,050; leaving apparently in his possession Nov. 10, 1890, 1,053 shares; also the additional account of Daniel Harrison, page 229, Ex. No. 2 discharging his account by release to the company of 1,225 shares without certificate number and a sale for cash certificate No. 39 for 1 share. Also the additional account of Thos. McKie, on page 229 of Ex. No. 2, common stock ledger, as follows:

| | | | |
|---|---|---|---|
| Aug. 1, '90. | To subscription | | 4,717 |
| " 30, " | By assignment to A. C. Boyd & Co | | 1,500 |
| " 30, " | By cash No. of transfer 28, cer. 44 | | 1 |
| Nov. —. | By assignment McKie's estate | | 3,216 |

Also the account of A. L. Norman, page 230, Ex. No. 2, common stock ledger, showing that on Aug. 1st, he was the sub-
146 scriber for 10 shares and a sale by cash without date of certificate 42 for 10 shares. Also the additional account of John A. Norman, page 230 of Ex. No. 2, showing Aug. 1, 1890, the subscription for 10 shares and the sale for cash certificate 41 one share and a release to the company of 9 shares. Also the additional account of F. Y. Clopper, page 230 of Ex. No. 2, common stock ledger, a subscription Aug. 1, 1890, for 50 shares and a disposition of the same without date by cash certificate 38 one share, and by cash certificate 92 for 49 shares, and also the additional account of C. W. Pool, on page 230, under date of Aug. 1, 1890, showing a subscription for 100 shares, and a disposition of certificate for one share for cash and of certificate 93, for 99 shares.

And in the same connection the account of A. C. Boyd & Co., on page 1, Exhibit No. 2, under date of Aug. 30, 1890, showing a purchase of that date from the Pennsylvania Plate Glass Company of 1,500 shares, the said company, as by its certificate of association, Exhibit No. 7, having on the 1st day of Aug. 1890, parted with all of its capital stock of 10,000 shares. And also offers the stock ledgers for the purpose of showing that no transfers have ever been made by Thos. McKie, or his estate, to Wray E. Davis. Mr. Schoyer also offers certificate No. 1, being the first issue, in Def'ts' Ex. No. 5, common stock certificate book, to A. C. Boyd & Co., for 1,500 shares of its capital stock of the par value of $150,000, dated Aug. 30, 1890, and receipted for by the said A. C. Boyd & Co., per Boyd.

Also a transfer by certificate No. 2 to George Cowen for one share receipted for by George Cowen on the 30th of August, 1890.

This offer not yet completed. To be finished the next meeting.

Adjourned to meet Tuesday, October 12, at 3 o'clock.

And now, October 12th, 1897, owing to illness of Mr. Schoyer, the taking of further testimony is adjourned to Tuesday, October 19th, 1897, at 3 o'clock p. m.

147 And now, October 19th, 1897, the further taking of testimony is adjourned to Tuesday, October 26th, 1897, at 3 o'clock p. m., owing to the illness of Mr. Schoyer.

TUESDAY, *October* 26, 1897.

Met pursuant to adjournment.

Present: S. Schoyer, Jr., for W. L. Kann and Penn Plate Glass Company, and with consent of complainant's counsel proceeds reserving to him the right to make objections the same as if he were present.

Mr. Schoyer offers in connection with the foregoing certificate No. 65, cancelled in the Defendants' Exhibit No. 5, and the stub entries thereon being a certificate of common stock issued to J. G.

Beamer, of New York city, on the 5th of November, 1890, for one share of the Pennsylvania Plate Glass Company, for the purpose of showing that the same was directly issued by the company to the said J. G. Beamer at that date to contradict the averment in the articles of association that all the capital stock of said company had been subscribed for prior to that date. And also offer the stub of certificate No. 290 in Exhibit Defendants' Exhibit No. 5, showing the surrender at that date and transfer of the said certificate 65 to H. B. Hall for the purpose of showing that he was a stockholder prior to the proceedings for the issuing of the mortgage and at the time of said proceedings and for many months thereafter. The said stockholders' meeting being held on November 15, 1890. And that said J. G. Beamer was visited with knowledge as a shareholder of the said proceedings to increase indebtedness, and also to show that the certificate filed therefor in the office of the secretary of the Commonwealth was false.

Also offers certificates 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, in said certificate book Defendants' Exhibit No. 5, for the purpose of showing direct issue of the said certificates from the Pennsylvania Plate Glass Company to the said J. G. Beamer to contradict the averments of the said articles of association and of the said certificate of indebtedness.

148 Adjourned to meet Tuesday, November 2, 1897, at 3 p. m.

Tuesday, November 2, 1897, the further taking of testimony, owing to the illness of Mr. Schoyer, is adjourned until Tuesday, November 9th, 1897, at 3 p. m.

Tuesday, November 9th, 1897, owing to the engagement of Mr. Schoyer the further taking of testimony is adjourned until Monday, November 15, 1897, at 3 p. m.

Monday, November 15th, 1897, the further taking of testimony is adjourned, owing to the engagement of Mr. Schoyer until Wednesday, Nov. 17th, at 3 p. m.

WEDNESDAY, *November 17th*, 1897.

Met pursuant to adjournment.

Present: S. Schoyer, Jr.

Owing to absence of counsel for plaintiff the hearing is adjourned until Friday, November 19th, 1897, at 3 o'clock p. m.

Friday, November 19th, 1897, Mr. Schoyer being engaged in common pleas No. 2 hearing adjourned until Monday, Nov. 22, 1897, at 3 p. m.

MONDAY, *November* 22, 1897.

Met pursuant to adjournment.

Present: J. S. Ferguson for complainant and S. Schoyer, Jr., for defendants.

Counsel for plaintiff objects to the evidence offered on October 26th, 1897, as incompetent and irrelevant.

This objection being made in pursuance to the rights reserved at that meeting.

149 *Testimony of Daniel Harrison.*

DANIEL HARRISON, a witness on the part of defendant.

Q. Mr. Harrison, you are a member of the bar of Allegheny county?

A. Yes, sir.

Q. Mr. Schoyer hands to the witness Defendants' Ex. No. 7 and asks him whether the name Daniel Harrison, where it appears on the 3rd page of that exhibit is in his handwriting?

A. Yes, sir, it is.

Q. Did you make the affidavit which appears upon that page under date of Aug. 1, 1890, before Christ Cribbs, recorder, in which you depose and say that the foregoing statements contained in the foregoing instrument are true?

—. ——.

Q. One of the averments in this exhibit contained in the 7th paragraph contained on the 2 page. "7th. That amount of the capital stock of said corporation is one million dollars divided into 10,000 shares of the par value of $100 and $100,000 being ten per centum of the capital stock has been paid in cash to the treasurer of the said corporation whose name and residence are George Cowen, New York city, State of New York." How are you able to make that averment?

(Objected to as incompetent and irrelevant.)

A. This took place on the 8th of August, 1890. On that day, the 8th of August, 1890, met at the office of Morehead and Head law office, in Greensburg, Westmoreland county, George Cowen, Philip Semmer, C. W. Pool, F. Y. Clopper, E. C. Boyd and Mr. Morehead, also myself, for the purpose of making application for a charter for a corporation to be called the Pennsylvania Plate Glass Company. The application was prepared as it is now. C. W. Pool, F. Y. Clopper and myself were to make the application or make the affidavit. Just before leaving the office I asked for evidence that the 10 per cent. of the $100 was paid to the treasurer whose name was George Cowen. George Cowen says I can convince you of that, here is a check made payable to me as treasurer of this company, and
150 it is certified. I looked at the check and believed it to be all right, but before going to the clerk of court's office I asked A. C. Boyd, now dead, whose representative I was if that was *bona fide?* He answered by saying certainly, these New York men have lots of money, called them his Hebrew friends. Without any further hesitation I went to the two others and made the affidavit.

Q. Do you recall whose check it was?

A. I do not, no sir. I presume I would not have known whose check it was or upon what bank it was drawn a week thereafter.

Q. Do you know whose certification it was?

A. No, sir, I do not.

Q. You say you are the representative of A. C. Boyd?

A. Yes, sir.

Q. What connection had he with that company and how were you his representative at that time?

A. A. C. Boyd had solicited Philip Semmer and George Cowen who he said were wealthy capitalists of New York city to raise capital to organize a company, have it incorporated for the purpose of erecting or constructing the Pennsylvania Plate Glass Company. I think that is called Huntingdon township, near Irwin, Westmoreland county. I was boarding at A. C. Boyd's residence in Duquesne borough, Allegheny county, Pa. He requested me to take stock in my name, whatever amount he would agree upon with Philip Semmer and George Cowen, and hold it until he would make some other disposition of it. I took that stock in my name and about six weeks thereafter or two months executed an assignment of all the stock back to A. C. Boyd. Not on the books of the company.

Q. Have you a copy of that assignment?

A. No, sir. I have no copy of that assignment; never did have any copy.

Q. But you acted, did you not, as the ostensible owner for a longer period of time?

A. Yes, sir, I was issued one share of stock shortly after
151 the incorporation, which I have today. I purchased from A. C. Boyd about three months after the incorporation $10,000 worth of stock, 100 shares. For which I paid him $6,000.

Q. Was it a professional relation which you had in this transaction?

A. I never was attorney for A. C. Boyd in connection with the Pennsylvania Plate Glass Company.

Q. In this exhibit it is also stated that you were a subscriber for 1,226 shares of the capital stock of the Pennsylvania Plate Glass Company, were you in point of fact a subscriber in any other way than you have already described as the representative of A. C. Boyd?

(Objected to as incompetent and irrelevant.)

A. No, sir.

Q. In the month of December, 1890, or the month of October, 1890, you still remained the ostensible owner of the stock?

A. I don't know how long I remained the owner of the stock of record.

Q. Were you a member of the board of directors?

A. Yes, sir.

Q. Do you recall at a meeting held in 1890, of the board of directors, October 1, 1890, Minute Book Ex. No. 1, page 18, that you moved that the board of directors recommend the issue of $250,000 worth of bonds and that the matter be referred to the executive committee to prepare details?

A. I do not recollect making any such motion.

Q. Do you recollect making a motion at the same meeting, appearing on the same page of the minute book? "Resolved that a meeting of the stockholders be called to convene at the general office of the company to take action on the approval or disapproval of the

proposed issue of $250,000 worth of bonds, or bonds to such amount not exceeding $500,000, as shall be approved at such meeting and that the secretary be and is hereby directed to give notice therefor required by law?"

(Objected to as incompetent and irrelevant.)

A. I do not.

152 Q. Would a reference to the minutes refresh your memory?

A. It would not, I would answer that in this way.

(Mr. Ferguson objects to anything except a categorical answer as incompetent and irrelevant.)

(Question repeated subject to the objection.)

A. I would say the resolution *where* I believe in the beginning of the career of this corporation prepared beforehand and presented, made at the meeting of the stockholders or directors and although the motion or resolution reads as though it was made by me yet it might have been made by one of the other directors.

Q. I now call your attention to a certified copy of the certificate of those meetings for increase of indebtedness of the Pennsylvania Plate Glass Company under date, certified under date of July 15, 1896, and identified as Exhibit No. 8, in which it is stated that you waived as the owner of 1,226 share- noticed by advertisement of the meeting of stockholders called to be held November 15, 1890, to approve or disapprove the proposed increase of indebtedness and also as recording your vote for 1,226 shares in favor of said proposed increase and ask you if in point of fact you were the owner of 1,226 shares at that time of the capital stock of the Pennsylvania Plate Glass Company?

(Objected to as incompetent and irrelevant.)

A. I was not.

Q. I now also ask you whether you were present at that meeting of the stockholders to vote on the question of approval or disapproval of said proposed increase?

(Objected to as incompetent and irrelevant.)

A. I can't remember.

Q. Is it not true sir, that on December 18, 1890, at a meeting—a special meeting of the board of directors of that date, the minutes of which are recorded on page 26 of Exhibit No. 1, that you did not present a communication to the board of directors asking to

153 be relieved of your subscription except 1 share to the extent say of 1,225 shares owing to stringency of the money market?

(Objected to as leading, incompetent, and irrelevant.)

Question withdrawn.

Q. How did you get rid of your stock to the extent of 1,225 shares?

(Objected to as incompetent and irrelevant.)

A. By executing an assignment of it to A. C. Boyd.
Q. That transferred your interest to A. C. Boyd?
A. Yes, sir.
Q. How did you get rid of your relation to the company?
A. I continued to hold the one share, and afterwards purchased 100 shares and the receiver's sale broke up my relationship to the company.
Q. You understand that to be a fair answer to the purport of my question?
A. I do.
Q. Well, do you not know that you requested by communication in writing the board of directors on the 18th of December, 1890, to relieve you on 1,225 shares of your alleged subscription because of the stringency of the money market?

(Objected to as leading, incompetent and irrelevant.)

A. I do have slight recollection of making such a request, I believe, in 1890.
Q. What did the company do about that request?
A. I have no further recollection of what the company did.
Q. Don't you know that you were present at that meeting of December 18th as one of the directors, and that a resolution was passed that the board assented to the relief you prayed for and instructed the secretary to notify you of their action?

(Objected to as leading, incompetent and irrelevant.)

A. I was under the impression that I had sent the request by mail, but I might have been present at the meeting in which the board took that action.

154 Q. Don't you know that subscription passed into the treasury of the company from which you were relieved?

(Objected to as leading, incompetent and irrelevant.)

A. According to the minutes I would say it did, but my understanding at the time was that A. C. Boyd was to take the stock.
Q. Was any certificate ever issued to you at all for 1,225 shares?
A. No, sir; not that I received the certificate.
Q. Do you know James G. Beamer?
A. Yes, sir.
Q. Do you recollect when you bought the 100 shares afterwards—was it not in 1892?
A. I paid for that hundred shares before October, 1890, but it perhaps was the latter part of 1891, or it might have been as late as the early part of 1892 that I received the certificate. But I had paid for it prior to October, 1890.
Q. You paid to——
A. A. C. Boyd.
Q. In money, I suppose?
A. I sent him a check for $5,000.
Q. When did you become acquainted with Mr. Beamer?

A. I believe Mr. Beamer attended a meeting of the board of directors perhaps as early as December, 1890.

Q. It was before the issue of these bonds?

A. It was prior to the issue of these bonds, I think.

Q. Did you ever act in any representative capacity for him in connection with this matter?

A. I would answer that by saying no.

Q. I call your attention to the minutes of November 15, 1890, page 23 of Exhibit No. 1, to refresh your memory.

(Objected to, that the minutes not being in the handwriting of the witness, they are not a source from which he can refresh his recollection.)

A. I might make my first appearance as early as October 1, 1890, if there was a meeting.

Q. Look now at the minutes of October 1, 1890, and see if they aid you in your memory.

155 (Objected to, as not the proper source of refreshing his memory, the minutes not being in the handwriting of the witness, as incompetent and irrelevant.)

Cross-examination:

Q. I understand that these minutes are not in your handwriting?

A. The minutes are not in my handwriting.

Adjourned to meet Wednesday, Nov. 24, 1897, at 3 p. m.

NOVEMBER 24TH, 1897.

Met pursuant to adjournment.

Present: Counsel as before.

Mr. Schoyer offers proceedings of the regular monthly meeting of the Pennsylvania Plate Glass Company held Nov. 5, 1890, appearing on page 20, of Def'ts' Ex. No. 1 reading from page 21:

"Mr. Norman moves that in view of the fact that A. C. Boyd and Co. have agreed to accept bonds of this company to the amount of $250,000 at 95 per cent. in lieu of cash payments on their contract should the stockholders of this company decide to issue bonds to this amount."

"Resolved that such proposition of A. C. Boyd and Company be accepted. Should the issue of such bonds be authorized by stockholders.

"Seconded by Mr. Clopfer. Carried."

The foregoing paragraph being offered with other extracts to show the manner in which the bonds were issued, the price and participation of James G. Beamer in connection with the proceedings for the issue and sale of bonds.

Also page 23 of said Minute Book November 15, 1890, showing the appointment of Beamer as one of the committee of three as a finance committee to superintend the issue of said bonds and decide on form and trustee of same.

Also proceedings of meeting December 3, 1890, page 24 of said Minute Book showing the appearance of said Beamer as director.

Also at said meeting, page 25, of said Minute Book a mo-
156 tion of the said Beamer ratifying purchases theretofore made by A. C. Boyd and Company for the Pennsylvania Plate Glass Company of materials necessary for the manufacture of plate glass and the payments for labor connected with the same and authorizing A. C. Boyd and Company to make such further expenditures as in their judgment may be necessary to manufacture plate glass.

Also meeting of January 7, 1891, page 30 of said Minute Book, said Beamer being present, especially that part on page 31 being resolution of said Beamer that treasurer pay to A. C. Boyd and Company 75 bonds at $1,000 each.

Also at the same meeting on page 32 the motion of the said Beamer which was carried that the president be authorized to negotiate with the Irwin Natural Gas Company and with the Irwin Water Company with regard to making direct contracts with said company for a further assurance of contract heretofore made.

Also meeting of Feb'y 5, 1891, page 35 of said Minute Book Exhibit No. 1. Mr. Beamer's motion to pay to said A. C. Boyd and Company thirty-one thousand-dollar bonds and also one hundred and forty-one thousand-dollar bonds.

Also at the same meeting the appointment of said Beamer to succeed Wray E. Davis on the executive committee.

Also minutes of April 1, 1891, page 37 of said Exhibit No. 1 Mr. Beamer's resolution authorizing issue of $145,000 in bonds to A. C. Boyd and Company.

Also page 42 of said exhibit meeting of June 3, 1891, Beamer's resolution to deliver $60,000 of bonds to A. C. Boyd and Company.

Also communication of A. C. Boyd & Company to the board meeting of August 5, appearing on page 50 of said Exhibit No. 1 and the action under the resolution of Mr. Beamer relating thereto.

Also the proceedings of the board of directors of July 6, 1892,
157 appearing on page 75 of said Def'ts' Exhibit No. 1, containing the report of the cancellation of the contract wtth the Irwin Land Company, to take effect June 15, 1892, and the Pennsylvania Plate Glass Company assuming all charges for water thereafter.

Also the proceedings of the board of directors in cancelling the contract between the Pennsylvania Plate Glass Company and the Irwin Natural Gas Company.

(The foregoing offer in its entirety and each and every part thereof objected to as incompetent and irrelevant.)

*Testimony Taken before H. D. Gamble by Mabel Breneman, Stenographer, Wednesday, December 8th, 1897, at 10 a. m.*

Present: E. G. Ferguson on behalf of plaintiff; S. Schoyer, Jr., on behalf of defendant.

It is agreed to by Mr. Schoyer, counsel for defendant, that the evidence shall be taken reserving the right of Mr. J. S. Furguson for further cross-examination and additional rights of objection if

he may so desire, he being actually engaged in the trial of a case at the present time, and therefore unable to be present.

*Testimony of Mr. Frank P. Boyd.*

Mr. FRANK P. BOYD, called on behalf of defendant and duly sworn, testified:

Direct examination by Mr. SCHOYER:

Q. Where do you live?
A. Irwin, Pennsylvania.
Q. Did you know Mr. A. C. Boyd?
A. Yes, sir.
Q. What relation were you to him?
A. He was my father.
Q. Are you familiar with his letter books and handwriting?
A. I know his handwriting by sight.
Q. Do you know his letter books?
A. I know his letter books when I see them; yes, sir.

158 Q. The witness now is shown two letter books, one marked Exhibit No. 9, commencing July 11th, 1890, and Exhibit No. 10, commencing February 1st, 1892, and is asked whether he recognizes these books as the letter-press copy books of his father.

(Objected to by counsel for plaintiff for the reason that the witness has not shown sufficient knowledge to enable him to identify the books.)

(Witness examines books.)

A. I do.
Q. Had you anything to do with your father's business?
A. Yes, sir.
Q. From what date?
A. I can tell probably by referring to these books here. March or April, 1891.
Q. You may state whether or not you know these books to have been used by your father for the purpose of taking impressions of letters written by your father in his business or by his directions.
A. Yes, sir.
Q. I wish you would state when your father died.
A. December 19th, 1896.
Q. You may state whether or not these books, Exhibits 9 and 10, were among your father's effects.
A. They were among his possessions.
Q. And that is where you found them?
A. Yes, sir.
Q. I now turn your attention to Defendants' Exhibit No. 5, and ask you to look at the signature to certificate No. 1 for 1,500 shares under date of August 30th, 1890, and ask you if you recognize the signature of A. C. Boyd & Co. per Boyd.
A. I recognize that as that of my father.
Q. And, also, certificate No. 3 in said exhibit, under date of Sep-

tember 2nd, 1890, and ask if you identify that signature, A. C. Boyd & Co., per Boyd, as your father's.

A. I do; yes, sir. That is my father's.

Q. And also certificate No. 4, September 2nd, 1890, for 50 shares?

A. Yes, sir.

Q. I now turn your attention to certificate No. 5 (look at them as we go along), No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No.
159 12, No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21, No. 22, No. 23, No. 24, No. 25, No. 26, No. 27, No. 28, No. 29, No. 30, No. 31, No. 32, No. 33, No. 34, No. 35, No. 36, No. 37, signed in some instances A. C. Boyd & Co. per Boyd, and others A. C. Boyd & Co. per B. Do you recognize the signatures on those certificates?

A. As that of my father's; yes.

Q. I now present you an agreement, dated the 30th day of August, 1890, between A. C. Boyd and Philip Semmers, partners composing the firm of A. C. Boyd & Co., with the Penn Plate Glass Co., and purporting to be signed by the company and by the parties of the first part, being Exhibit No. 11, and ask you if you recognize the signatures to that.

A. I recognize that of A. C. Boyd, Philip Semmers, also that of C. W. Pool, also that of A. Livingstone Norman.

Counsel for defendant offer in evidence, in connection with this testimony, Exhibit No. 11.

Objected to by counsel for plaintiff as incompetent and irrelevant; additional objections to be specified hereafter on part of J. S. Furguson; and for the further reason that the witness has not shown any knowledge of the handwriting of any of the parties executing this agreement.

Q. You, of course, know the handwriting of your father very well?

A. I do.

Q. Do you know the handwriting of these other gentlemen?

A. I do; yes, sir.

Q. Have you had frequent occasion to see their writing?

A. Yes, sir.

Q. You were in the employment of the Penn Plate Glass Co., were you not?

A. I was at one time.

Q. And your familiarity with these signatures comes from that connection?

A. Some of it; some from going over correspondence we had from these parties.

Q. I now hand the witness paper to be marked Exhibit No. 12, not bearing any date, written on a paper printed, A. C. Boyd,
160 Irwin, and ask the witness whether he recognizes the handwriting, and to state, if he does, whose handwriting it is. The said exhibit is an estimate of the cost of the proposed construction of the Penn Plate Glass Co., and I offer the same in evidence in connection with the testimony of the witness on the identification.

Objected to by counsel for plaintiff generally as incompetent and irrelevant, to be supplemented by further objections by J. S. Furguson, the active counsel in the case.

Q. I now hand to the witness a series of letters: December 27th, 1890, No. 13; December 30th, 1890, No. 14; December 22d, 1890, No. 15; December 20th, 1890, No. 16; March 27th, 1891, marked No. 18; purporting to be written to A. C. Boyd & Co. by Philip Semmer; and ask the witness, first, whether he recognizes the signatures; and, second, whether or not they formed part of his father's papers found in his possession after his death (the exhibit marks being for identification simply).

A. I recognize the signature as that of Philip Semmer, and the papers were in the possession of A. C. Boyd at the time of his death.

Q. Also, further letters addressed to A. C. Boyd & Co., purporting to be signed by Philip Semmer; one dated April 28th, 1891, Exhibit 19; one dated May 13th, 1891, Exhibit 20; one dated September 14th, 1891, Exhibit 21; one dated August 12th, 1891, Exhibit 22; one dated August 14th, 1891, Exhibit 23.

A. I recognize the rest as that of Philip Semmer, and they were in my father's possession at the time of his death, but I can't recognize 22 or Exhibit 23, because the signature is typewritten.

Q. Do you recognize them as having been in your father's possession?

A. Yes, sir.

Q. And also a letter of A. C. Boyd & Co., purporting to be signed by Philip Semmer, Exhibit 24, and a letter dated August 1st, 1891, Exhibit 25, and a letter dated July 30th, 1891, Exhibit 26, and ask the witness whether he recognizes the signatures to these letters, and whether they were among his father's papers at the time of his death.

161 A. I recognize these three exhibits as being in the possession of my father at the time of his death, but the signatures I can't.

Q. Also, a letter purporting to be signed by Philip Semmer, addressed to A. C. Boyd & Co., June 12th, 1891, and ask the witness whether he recognizes the signature, and whether it was among his father's papers?

A. I recognize the paper as being among my father's possession at his death, but I do not recognize the signature as that of Philip Semmer.

Q. Also, a letter to A. C. Boyd & Co., dated December 8th, 1890, Exhibit 28; January 26th, 1891, Exhibit 29; July 1st, 1891, Exhibit No. 30; December 1st, 1890, Exhibit 31; purporting to be signed by Philip Semmer, and addressed to A. C. Boyd & Co., and the question repeated—whether he recognizes the signature, and whether or not they were among his father's papers at the time of his father's death.

A. I recognize Exhibits 28, 29 and 31; that the signature is that of Philip Semmer, and I recognize Exhibits 28, 29, 30 and 31 as being in my father's possession at the time of his death.

Q. Also, a letter of June 6th, 1891; May 29th, 1891; April 30th, 1891; June 8th, 1891; June 9th, 1891, and a letter from P. C. Knox, dated June 1st, 1891, and two certificates of stock, one being certificate No. 25,—two duplicates, both dated January 23rd, 1891, and bearing a transfer of A. C. Boyd, June 3d, 1891, to A. J. Sweeney & Son, and all being connected together and marked Exhibit 32; and ask the witness to identify the signatures to those letters so far as he is able to, and the signature of A. C. Boyd on the stock, and to say whether or not these papers were among his father's papers at the time of his death, except the two certificates.

A. I recognize the one dated June 6th, 1891, as the signature of Philip Semmer; and the one dated May 29th, 1891, as being Philip Semmer's signature, and the one dated April 30th, 1891, I
162 recognize only as being in my father's possession at the time of his death; the one dated April 28th, 1891, I recognize in the same manner as above—that is, being in his possession; one dated June 1st, 1891, I recognize as being in his possession; June 8th, 1891, I recognize as being in his possession at the time of his death, and also recognize the signature as that of Philip Semmer; the one dated June 1st, 1891, I recognize as being in his possession at the time of his death. I recognize the signature of the two certificates in duplicate No. 25 for 25 shares as that of A. C. Boyd.

Q. I now hand the witness, for his examination, a letter addressed to A. C. Boyd & Co., July 19th, 1890, Exhibit 33, purporting to be signed by Philip Semmer; another letter similarly addressed and signed, dated August 21st, 1890, Exhibit 34; another letter similarly signed and addressed, dated July 18th, 1890, Exhibit 35; and another letter similarly addressed and signed, dated August 6th, 1890, Exhibit 36; and another letter similarly addressed and signed, dated October 13th, 1890, Exhibit 37, and ask the witness whether he recognizes the signatures upon those letters, and whether or not they were in his father's possession—among his father's papers at the time of his death.

A. I recognize Exhibit 33 to Exhibit 37, inclusive, as bearing the signature of Philip Semmer, and the papers were in my father's possession at the time of his death.

Q. I also hand to the witness a letter dated May 17th, 1893, addressed to A. C. Boyd, Esq., purporting to be signed by J. G. Beamer, and a letter of June 15th, 1893, Exhibit 39, addressed to A. C. Boyd, and purporting to be signed by J. G. Beamer, and ask him, first, if he recognizes the signature, and second, if they were among his father's papers at the time of his death.

A. I recognize the signature of both of these letters as that of J. G. Beamer, and also the papers were in my father's possession at the time of his death.

Q. I hand to the witness a paper dated August 9th, 1892,
163 Exhibit 40, addressed to the Penn Plate Glass Co., and purporting to be signed by George Cowan, and being a guarantee of a return by A. C. Boyd & Co. to the treasury of certain stock, and ask the witness whether he recognizes the signature of George Cowan.

A. I recognize the signature as being that of George Cowan.

Q. Was that among your father's papers at the time of his death?

A. I won't say for sure that it was.

Q. I now hand the witness a letter dated New York, January 14th, 1891, marked Exhibit 41, addressed to Messrs. A. C. Boyd & Co., and purporting to be signed by A. C. Boyd & Co., per George Cowan, and ask the witness whether he recognizes the signature of Mr. Cowan, and whether that was among the papers found in his father's possession at the time of his death.

A. I recognize that as the signature of George Cowan, and the paper was in my father's possession at the time of his death.

Q. I now hand the witness a proxy purporting to be signed by George Cowan, Exhibit 42, a letter dated December 18, '91, addressed to A. C. Boyd, and purporting to be signed by George Cowan, Exhibit No. 43; and a letter dated June 17, 1892, addressed to A. C. Boyd, and purporting to be signed by George Cowan, No. 44; and a letter dated October 21st, 1892, Exhibit 45, addressed to A. C. Boyd, and purporting to be signed by G. Cowan, and ask the witness whether or not he recognizes the signature of George Cowan, and whether or not they were found among his father's possessions at the time of his death.

A. I recognize Exhibit- 42, 43, 44 and 45 as the signature of George Cowan, and also that they were in my father's possession at the time of his death.

Q. Exhibit 46, being a letter dated November 5th, 1892, addressed to A. C. Boyd, and purporting to be signed by Phillip Semmer, I now show the witness, and ask whether he recognizes the signature of Phillip Semmer, and whether or not they were found
164 among his father's papers at the time of his death.

A. I recognize this as the signature of Phillip Semmer; and, also, the papers were in my father's possession at the time of his death.

Q. I now hand the witness a letter dated March 27th, 1896, Exhibit 51, addressed to A. C. Boyd, and purporting to be signed by J. G. Beamer, and the envelope, No. 52; and also a letter dated December 21, 1894, and addressed to A. C. Boyd, purporting to be signed by J. G. Beamer, Exhibit 49, and the envelope, Exhibit 50; and a letter of same to the same, September 21st, 1894, Exhibit 47, and the envelope, Exhibit 48; and a letter dated March 27th, 1896, addressed to A. C. Boyd, purporting to be signed by J. G. Beamer, and being Exhibit 51, and the envelope 52, and a letter dated July 19th, 1893, addressed to A. C. Boyd and purporting to be signed by J. G. Beamer, being 57, and an enclosure, Exhibit 58, dated July 22d, 1893, addressed to "My dear Boyd" by A. Livingstone Norman; also a letter dated November 1st, 1894, Exhibit 55, addressed to A. C. Boyd and purporting to be signed by J. G. Beamer, and the envelope, 56; and a letter of September 18th, 1895, addressed to A. C. Boyd, purporting to be signed by J. G. Beamer, being Exhibit 53, and the envelope 54; also a letter to A. C. Boyd, purporting to be signed by J. G. Beamer, dated March 26th, 1894, and its envelope 61; and ask the witness if he recognizes the signatures to these

various documents and envelopes, and whether or not they were in the possession of his father at the time of his death—among his papers.

A. Exhibits 51, 47, 49, 55, 53 and 60, I recognize to be the signature of J. G. Beamer, and the said papers were in my father's possession at the time of his death. Exhibits 61, 54, 56, 50, 48 and 52 I recognize as the handwriting of J. G. Beamer; letter dated July 22d, 1893, I recognize the signature of A. Livingstone Norman; Exhibit 59, I recognize as the handwriting of A. Livingstone
165 Norman; Exhibit 57 I recognize as the signature of J. G. Beamer; and that the papers were in my father's possession at the time of his death.

Q. I hand the witness a letter dated June 29th, 1890, Exhibit No. 62, addressed to A. C. Boyd, and purporting to be signed by Phillip Semmer, and ask the witness whether he recognizes that signature, and if it was among his father's papers at the time of his death?

A. I recognize the signature as that of Phillip Semmer, and that it was in my father's possession at the time of his death.

Q. I show the witness certificates Nos. 91, 94, 95, 96 and 97, the same being in Exhibit No. 5, and ask him if he recognizes the signature of A. C. Boyd?

A. I do.

Q. And also in the same exhibit is certificate No. 148, receipted for by A. C. Boyd & Co. for 500 shares. Do you recognize that signature?

A. I don't recognize that signature.

Q. But do you know whose signature this is (indicating)?

A. That signature, A. C. Boyd & Co., is that of Philip Semmer.

Q. Do you know whose handwriting this is (indicating)?

A. No, not certainly.

Cross-examination by Mr. FERGUSON:

Q. Do I understand you to say that you live at Irwin?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

Q. Do you know Philip Semmer?

A. Yes, sir.

Q. Do you know A. Livingstone Norman?

A. Yes, sir.

Q. How frequently have you seen them write their signatures?

A. I saw Mr. Semmer write his signature day after day for at least four months.

Q. When?

A. I don't know exactly the year. The time that he was president of the Penn Plate Glass Co.

Q. Was he located at Irwin?

A. He was at Irwin when president of the company.

166 Q. You were in the employ of the company at that time?

A. I was on the clerical force.

Q. With reference to Mr. Norman, how often have you seen him write?

A. I haven't seen Mr. Norman write his signature personally at all.

Q. Then, when you say that you recognize certain exhibits—the signatures to certain letters purporting to be signed by Mr. Norman, how do you fix the signature as his signature?

A. By looking over previous letters—letters that I have had occasion to look at.

Q. You have no personal knowledge of the handwriting of Mr. Norman?

A. Not of Mr. Norman.

Q. With reference to Mr. Beamer, how do — recognize his signature? Have you seen him write?

A. I saw him at one time—on one occasion only.

Q. When was that?

A. I don't remember.

Q. When you attempt to identify his signature, you do not identify it from any personal knowledge of his handwriting?

A. Not personal; no, sir.

Q. With reference to Mr. Cowan—have you seen him write?

A. Yes, sir.

Q. Frequently or otherwise?

A. Well, not very frequently; occasionally.

Q. Can you give us an idea of the number of times you have personally seen him sign his name?

A. I don't know how many times I have seen him sign his name. It is pretty difficult to tell.

Q. I know it is difficult, but I would like to have some idea as nearly as you can give it.

A. I have seen him at least once.

Q. Have you seen him more than a dozen times?

A. Am not able to say.

Q. Have you seen him more than six times?

A. I don't like to say that.

Q. So that you can only say that you only now recall having seen him write his name once, and you may have seen him several times more than that, but you are not certain?

167

A. Yes, sir.

Q. So that, when you identify his signature, you do not identify it from your personal knowledge of his handwriting, do you?

A. Not personal.

Q. Mr. Boyd, with reference to these papers—letters and other papers that you have identified as being found in the possession of your father, or among your father's papers at the time of his death, I ask you how you are able to say at this time that they were among his papers at that time?

A. I have read each and every one of these papers that have been presented to me here at this time personally, and I have read them frequently, and am more or less acquainted with their contents.

Q. Did you collect together these papers which have been examined by you after your father's death?

A. I did.

Q. Did you examine your father's papers and separate these from the other papers?

A. I did.

Q. Personally?

A. Yes, sir.

Q. Were you connected with the administration of your father's estate in any way?

A. No, sir; I am not.

Q. Can you tell us where you found these letters?

A. In our house—place of residence.

Q. In a desk at your father's house?

A. Found them in letter boxes and in a closet.

Q. Were there other letters besides this?

A. There were.

Q. From other people?

A. From other people.

Q. A large number of those letters, were there?

A. Quite a number.

Q. And other papers?

A. And other papers.

Q. I believe you did say that you sorted these letters out personally?

A. I did.

Q. What did you do with them then?

A. After I assorted them out I was asked to show the letters, and carried them myself to these party-s' place of business.

168 Q. Who is that?

A. Mr. W. L. Kann.

Q. And when was that?

A. As near as I can judge it was some time within the last four months.

Q. And have they been in your possession since that time, or did you leave them with Mr. Kann?

A. I left them with Mr. Kann.

Q. So you haven't seen them, as I understand you, for the past four months until today?

A. Some of them I have seen very recently.

Q. But the greater part of them you have not seen?

A. The greater part I have not seen for some time.

Q. When did your father die?

A. December 19th, 1896.

Q. When did you separate these letters from the other papers and letters you found?

A. Somewhere within four months ago. I did tell you.

Redirect examination by Mr. SCHOYER:

Q. Mr. Cowan was the treasurer of the Penna. Plate Glass Co., was he?

A. He was; yes, sir.

Q. And Mr. A. Livingstone Norman was the secretary, was he not?

A. Not to my knowledge.

Q. He bore some relation, didn't he?

A. Not to my knowledge. He was, I believe, at one time on the board of directors.

Q. Mr. Philip Semmer was at one time president?

A. At one time he was president.

Q. And Mr. Beamer was a director and vice-president too?

A. At one time; yes, sir.

Q. You may state whether or not in your connection with the Penna. Plate Glass Co. you recognized letters signed by these various signatures on official business and accepted by the company as correct?

(Objected to by counsel for the plaintiff as leading and as generally incompetent and irrelevant, and not the proper manner in which to prove the signatures of the names desired to be proven.)

169 Q. You speak about the signatures of these other gentlemen you have seen writing but once, you may state whether or not you have seen many of their letters in the possession of the company on official business.

(Objected to by counsel for plaintiff for the same reasons.)

A. I have seen and have in my possession numerous letters bearing the signature of Philip Semmer, Geo. Cowan, J. G. Beamer and a few of A. Livingstone Norman.

Q. Have you any doubt that these papers came from your father's or were in your father's possession at the time of his death?

(Objected to by counsel for plaintiff as being a conclusion and not a statement of fact.)

A. I have no doubt whatever but what they were in his possession at the time of his death.

Q. You separated these at the request of Mr. Kann?

A. Yes, sir.

Q. As to your opportunity of knowing your own father's signature——

A. I have seen him write it many a time. I have seen his signature signed to a few little checks I have got from him and know that he signed.

*Testimony of W. L. Kann.*

W. L. KANN, called by defendant, testified:

Direct examination by Mr. SCHOYER:

Q. You have seen these various exhibits as identified by Mr. Boyd as being in his father's possession at the time of his death, and delivered to you. I wish you would state whether or not that is the case, or whether these are the papers you received from Mr. Frank Boyd.

A. Yes; the papers that were offered here as exhibits this morning are the papers which I received from Mr. Frank Boyd as the papers which he selected from his father's papers at the time he died at my request.

170 By Mr. FERGUSON:

Q. Have they been in your possession continuously since that time?

A. Yes; and Mr. Schoyer, my counsel; never left our possession since.

Q. Familiar with their contents and know them?

A. Well, very much so.

*Testimony of F. Y. Clopfer.*

Mr. F. Y. CLOPFER called on behalf of defendant and duly sworn, testified:

Direct examination by Mr. SCHOYER:

Q. You reside at Greensburg, Pa.?

A. Yes, sir.

Q. What is your age?

A. I am about sixty years old.

Q. How long have you been a resident of Greensburg?

A. All my life.

Q. Do you know Philip Semmer?

A. Yes, sir.

Q. Do you know Mr. George Cowan?

A. Yes, sir.

Q. Do you know Mr. James C. Beamer?

A. I believe I know the gentleman. I had forgotten his initials. Mr. Beamer was connected with the Penna. Plate Glass Co.

Q. And Mr. Pool?

A. Mr. Pool, yes.

Q. Mr. Boyd?

A. Yes, sir.

Q. A. C. Boyd?

A. Yes, sir.

Q. You are connected with the Penna. Plate Glass Co. as one of the original incorporators, I believe Mr. Clopfer?

A. Yes, sir; I believe so.

Q. What is your business—what was it in 1890?

A. Diversified. I call myself a farmer, and carry on farming always. I am a dealer, though, in lands and real estate and coal lands.

Q. Do you know an institution known as the Irwin Land Company, or some such name?

A. North Irwin Land Co.? Yes, sir.

Q. They had a tract of land that was in the market, I believe, in 1890?

A. Yes, sir; it was about that time, or a little before. '89 or the early part of '90.

171 Q. Do you know a natural gas company and a water company connected, directly or indirectly, with that land company—North Irwin?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. I know of the water company and the gas company, too, but they were not connected with the land company. Individual members belonged to both organizations, but they were in no ways connected.

Q. They were affiliated to some extent, were they not?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

Question not pressed.

Q. At any rate, when did you first hear of the project of a plate glass company?

(Objected to by counsel for plaintiff as leading, and as incompetent and irrelevant.)

A. Do you want to know the time?

Q. Yes; with reference to the commencement of the work—before or after?

A. I think it was in the early part of 1890; I won't be positive as to the exact dates. It is a good while since. I think it was in the early part of 1890.

Q. I wish you would state as well as you can recollect what transpired between you and Mr. Semmer with reference to the project of a glass company, between you and him, you representing the Irwin Land Company, if anything?

(Objected to by counsel for plaintiff for the same reasons.)

A. We had several conferences with Mr. Semmer in regard to getting the plant there, a number of times. We offered him inducements. I was engaged to another land company at Jeanette. We tried to get him there. He finally concluded that he would make his location at Irwin if we would donate him some ground, and we did, and agreed to furnish him with water for a certain period; and gas at a nominal price, I think it was.

172 Q. Can you recall how much land, in round numbers?

A. No; I don't think I could. I think it would occupy probably four or five acres of ground.

Q. I now show you Defendants' Exhibit No. 7. H. D. Gamble, examiner, being the original application for a charter of the Pennsylvania Plate Glass Company, and call your attention to yourself being named as No. 4, a subscriber for 50 shares, and your signature to the affidavit therein contained, and ask you whether or not your signature to that affidavit is your signature.

(Objected to by counsel for plaintiff for the same reasons.)

A. That is certainly my signature.

Q. Did you make any subscription for 50 shares of the stock as therein recited in any other way than is recited on the face of this paper?

(Objected to by counsel for plaintiff for the same reasons.)

A. My recollection isn't clear about these matters, Mr. Schoyer. I am not positive, but giving you my best recollection, I took one original share only,—that I took and paid for in cash at the time I was asked to do it. It was for the purpose they wanted the board of directors on the ground.

Q. Who urged you on that subject?

A. Mr. Semmer.

Q. Do you recall what was said in substance, if not verbatim?

(Objected to by counsel for plaintiff for the same reasons.)

A. I don't know. I can't recall the whole conversation. The object was to get me——

Q. The substance,—that is what I want.

A. It was simply that he wished me to be an incorporator, and I would have to take a share of stock for the purpose of doing so.

173 Q. What was said or done about the 50 shares,—the other 49?

(Objected to by counsel for plaintiff for the same reasons.)

A. That was subsequent, I think, to the first proposition.

Q. But what was said,—how did you come to be a subscriber for 50 shares,—what arrangement was proposed to you?

A. Mr. Semmer proposed—it was proposed at a meeting afterwards held—they had difficulty in getting rid of their stock, selling their stock at par value, and they wanted some man to be more identified with it to a larger amount who would be in our section of the country, and that would be a prominent man and would help along the concern in raising subscriptions, and it was on that ground that I subscribed for the 50 shares, with the understanding that the stock was to be transferred, and I was to get the old check back, or the equivalent, and the stock transferred.

Q. With whom did you make that arrangement?

A. That was with Mr. Semmer, I think.

Q. So that you gave a check under that arrangement?
A. Yes, sir.
Q. Was that check presented for payment?

(Objected to by counsel for plaintiff for the same reasons.)

A. I don't think the check was ever presented. The check was returned to me and the stock transferred from my name.
Q. They did transfer the forty-nine shares?
A. I think that was fifty shares. I am just giving the best of my recollection. It would be my recollection, fifty shares after the first.
Q. You paid, then, for one share?
A. I paid for one share; yes, sir.
174 Q. And your check for the forty-nine was returned?
A. Yes, sir.
Q. Can you recall the approximate time between giving that check and getting it back?
A. It was the same day, anyhow.
Q. I am going to ask you a question, Mr. Clopfer, in order that you may do yourself on record the justice of an explanation. I notice that you have made an affidavit on Exhibit No. 7 that the statements set forth in that application are true, and, among other allegations, is that $100,000 in cash had been paid to the treasurer, being ten per cent. of a million dollars capital stock. Will you explain how you came to make that affidavit?

(Objected to by counsel for plaintiff for the same reasons, and for the further reason that it is evidence given in contradiction of an instrument.)

A. I done it under the full belief at the time that the ten per cent. were paid in.
Q. From whom did you get that information?
A. From some of the directors. I think from Mr. Semmer. I think I had some evidence at the time that it had been paid in, that induced me to make that. I believed too at that time that I had paid in what I had subscribed individually, that is, one share.
Q. Mr. Clopfer, you were then after you subscribed for 50 shares, as I understand you, correct me if I am wrong so far as 49 shares is concerned, simply a representative of what has been named in some of the letters here as a "dummy"?
A. Yes, sir.
Q. And that those 49 shares were to be taken off your hands, and were taken off your hands, and the check which you gave returned?
A. I subscribed on that condition that they were to be taken off my hands,—they were to either return the check or the equivalent.
Q. You became afterwards director of the company, did you not?
A. Yes, sir.
175 Q. Did you occupy any other position in the company than that of a director?
A. I haven't a distinct recollection of anything else.
Q. You were subsequently vice-president, were you not?

A. It seems that I was at one time second vice-president. I wasn't at all identified with the company more than to give my name. I tried to get them to locate on our land, and I offered more inducements, so far as that goes, than I should have done. I should never have lent my name to them.

(Objected to by counsel for plaintiff as not being responsive to the question.)

Q. At a meeting of the board of directors held August 30th, 1890, in Exhibit No. 1, being a minute book of the company, referring to page 13, were you not elected second vice-president?

(Objected to by counsel for plaintiff, first, for the reason that the minutes themselves are the best evidence, if it is sought to prove the fact in this way; second, if the witness' position as vice-president is sought to be proven by the witness, his own recollection is the test, and it is not right to use the minute book.)

A. I notice that I have been elected here vice-president. So far as that is concerned, I have no doubt I was elected vice-president, but I have no distinct recollection of it.

Q. Do you recognize that as the minute book of the company?

A. I don't know anything about that.

Q. I now call your attention to certificate No. 38 in Exhibit No. 5, common stock certificate book, under date of August 30th, 1890, and ask you to look at the signature here to the receipt receiving the certificate, and say whether that is your signature.

A. That is my signature, undoubtedly.

Q. And the transfer dated February 19th, 1892—that is your signature also?

A. Yes, sir.

176 Q. And, also, I call your attention to certificate No. 92 for 49 shares of the same Exhibit No. 5, and ask you whether that is your signature for the receipt of that certificate.

A. Yes, sir; that is certainly my signature.

Q. And this assignment of certifiate No. 92 is indorsed in blank. Is that your handwriting to that indorsement?

A. Yes, sir.

Q. I now call your attention, Mr. Clopfer, to a paper now marked Exhibit No. 63, purporting to be a bond of Philip Semmer to C. W. Pool, dated the 13th day of June, 1890, and relating to the land to be given to Philip Semmer for the consideration of the erection of two forty-pot furnaces, and ask you what you know about that paper and the signature.

(Objected to by counsel for plaintiff for the reason, first, that the paper speaks for itself, and generally as being incompetent and irrelevant.)

A. I have a recollection of a paper of this kind being made. I am not well enough acquainted with Philip Semmer's signature to say positively that that was his, though.

Q. I now hand to you a paper marked Exhibit No. 64, in which

your name appears, dated Irwin, March 26th, 1892, and ask you whether you identify that paper and your own signature, and any other signature on that.

A. Yes, sir; that is certainly my signature there.

Q. You recall that paper?

A. Yes, sir. Oh, no; I wouldn't know any of them.

Q. Is that the paper in which the land company agreed to turn over land in consideration of the construction of the glass works?

A. No; I don't think it is. I think that is for the annulling the water and the gas leases.

Q. Then the arrangement for the gas lease was subsequently annulled, and annulled by this paper?

A. I believe it was annulled by this paper. I would like to read the paper over again. (Paper read by witness.) Yes; this
177 is what I supposed it was, for the use of the water and plate glass company.

By Mr. SCHOYER: I offer that paper in evidence in connection with the testimony of the witness.

(Objected to by counsel for plaintiff for the following reasons:)

First. As incompetent and irrelevant.

Second. That there is not sufficient proof of the execution of it on the part of the Pennsylvania Plate Glass Company.

Q. I now call your attention to a contract dated 16th of June, 1890, between the Irwin Natural Gas Co. and Philip Semmer, relating to a supply of natural gas to the proposed plate glass company, and ask you if you recognize that and the contract itself?

A. I don't recognize the contract, but I am aware that there was a contract made.

(Objected to by counsel for plaintiff as not being responsive to the question.)

Q. You were, from your connection with the Irwin Land Company, familiar with the arrangement that was made?

A. Yes, sir.

Q. And that this was the arrangement as you now recall it?

A. I couldn't say that this was the exact arrangement. I know that there was an arrangement made and a contract drawn.

(Objected to by counsel for plaintiff for the reason that it makes no difference what the understanding of this witness was as to my arrangement made by any corporation of which he was a stockholder or officer; that the arrangement, if any existed, must be proven by the minutes of the corporation, or by the agreements themselves, if in writing.)

Q. Do you recognize such an agreement as having been entered into?

A. Yes, sir; that agreement was made between the gas company and the glass company.

178 Q. I now call your attention to Exhibit No. 66, bearing date the 10th day of June, purporting to be a contract be-

tween C. W. Pool and his wife and Philip Semmer, for the conveying of the land in consideration of a covenant to erect upon the premises two forty-pot furnaces, and ask you whether you recognize that paper, or know that such a contract was entered into.

(Objected to by counsel for plaintiff, for the reason that it is incompetent and irrelevant, and as being an improper way of quoting the contract; that the contract, if any existed, must be proven by the subscribing witness and the officers who executed the paper and the minutes of the corporation. It is not proper to ask this witness whether or not a written agreement is the agreement he understood was made.)

A. I cannot identify the agreements. I know an agreement of this kind was made. The land was in Pool's name at that time, and not in the North Irwin Land Company.

Q. Do you know how the title to the lands of the land company were held?

(Objected to by counsel for plaintiff for the reason that the records themselves are the best evidence.)

A. They were taken mostly in Pool's name in the first place, and were transferred.

Q. Under the direction of the company?

A. Yes, sir.

Q. Who was president of the Irwin Water Company?

(Objected to by counsel for plaintiff for the reason that the records of the minute book is the best evidence.)

A. I couldn't tell who was president of the Irwin Water Company.

Q. I hand to you an exhibit marked Defendants' Exhibit No. 8, H. D. Gamble, examiner, being the certificate of the proceedings of the meeting for the increase of indebtedness of the Irwin Plate Glass Company for the issuing of $250,000 of bonds, in which it is represented that you were at that time the owner of 50 shares of the capital stock of the company, and that you, with other stock-
179 holders, had waived notice by advertisement of the meeting of the stockholders to be held on November 15th, 1890, to take action on the approval or disapproval of the proposed increase of the indebtedness of the said company of $250,000, and agreeing that the meeting should take place for that purpose on the 15th of November, 1890. As I understand it, sir, from your testimony, you were not at that time the holder of 50 shares?

A. That would be my recollection of it.

Q. Then the certificate for the 50 shares had not been issued to you at the date of your subscription—the date you gave your check?

A. I don't know that—whether it was issued at that day or not. I won't say positive.

Q. But to aid your memory, the articles of association, Exhibit

No. 7, are dated the first of August, 1890, in which you represent yourself to be the holder of 50 shares.

A. I am not positive that that is correct. That is my signature undoubtedly, but I am not positive that I owned that 50 shares, or had subscribed for it when I signed that.

Q. As I understand your testimony, you never did subscribe, but for the purpose of the organization, took the 50 shares and handed in your check, and that was returned to you, or its equivalent?

A. That was the fact, but they seem to carry me the holder of the 50 shares all along. That isn't correct. I wasn't the holder of 50 shares all along. I had the one share and that was all. That was what I subscribed for and paid for at the time I took it.

Q. Mr. Clopfer, at the time it was suggested to you to become one of the organizers because they wanted home people, work had not been commenced on the construction, had it?

A. I think not. No work commenced on it.

Q. At the time of the organization of the company, had work been commenced on the construction of the plate-glass works?

A. I don't recollect whether the works were commenced or not when it was organized.

Q. At any rate, at the time of the organization of the company, the buildings had not been constructed?

180 A. I think not. I don't think they had commenced them, but I wouldn't be positive.

Q. They may have done a little excavating, possibly?

A. It might have been; yes.

Q. Do you know when those works were completed?

A. No; I couldn't tell you that.

Q. Well, approximately. A year or two years, or to the best of your recollection.

A. I think it was fully a year.

Q. At the time of these preliminary negotiations at which your land company made inducements for the location of the glass works there, did you have conversations with A. C. Boyd also?

A. No, sir; I think not.

Q. Did you know who the proposed contractors were to be for building the works?

A. Not at that time.

Q. But you did know that it was proposed to organize a company?

A. Yes, sir.

Q. To whom the works were to be turned over?

A. Yes, sir. My understanding was that that company was to be organized in the East—in New York.

Q. You subsequently knew, I presume, that the contractors were A. C. Boyd & Co.?

A. Yes, sir; I recollect very well agreeing to the contract with them. I was called to be one of the directors, although I didn't pay any strict attention to what they were doing. I hadn't any individual interest in it, but I recollect of their making a contract with Boyd & Co. for the construction of the works.

Q. I now call your attention to Defendants' Exhibit No. 11, purporting to be a contract dated the 30th of Aug., 1890, between A. C. Boyd and Philip Semmer, composing the firm of A. C. Boyd & Co., of the one part and the Pennsylvania Plate Glass Company of the other part, being a contract for the erection of a plate-glass plant for the Pennsylvania Plate Glass Company at Irwin for certain considerations, and ask you whether that is the contract to which you refer. Look at the signatures, that may help you.

181 A. I recollect very distinctly of the plate glass company entering into a contract with A. C. Boyd & Co.

Q. State whether or not that is, to the best of your knowledge and belief, the contract which was entered into to which you have referred?

A. I couldn't say so without reading it over. I know there was a contract entered into. Whether it was just this or not I couldn't tell without an examination.

Q. Looking at the minutes wouldn't refresh you, would it?

A. I don't think it would. I know we entered into a contract with them—entered into a contract for the building of these plate-glass works. This being the particular contract though, I wouldn't know that.

Q. At the date that the contract was entered into the work had all yet to be done, had it not?

A. Yes, sir; I think all of it.

Q. You know Mr. James G. Beamer?

—. Yes, sir.

Q. When did you first know him, prior to his appearance as a member of the board?

A. No, sir; the first time I met him was at a meeting of the board in Irwin; I don't know the dates.

Q. You knew, I suppose, or did you know, that Mr. Beamer was one of the finance committee to finance the bonds?

(Objected to by counsel for plaintiff.)

A. I couldn't say.

Q. Did you ever see any printed circulars inviting loans to A. C. Boyd & Co. to aid in building the works and setting out an estimate of the cost?

A. I think I did.

Q. I now hand to you a printed statement and call your attention to all that is on it except the last paragraph on the last page. Look at that and say if that is the circular, or the substance of the circular, to which you refer?

A. I couldn't identify it.

Q. Nor the substance of it?

A. Why, yes; I can recognize some of the substance of it.

182 Q. The estimates?

A. Yes, and some of the language he used comes back familiar to me.

Q. Look at those figures and see if they are as you remember the proposed loan, $80,000?

A. I am not clear enough in my mind to say, Mr. Schoyer.

(Hearing here adjourned until 10 o'clock next day, December 9th, 1897.)

And now, to wit, Thursday, December 9th, 1897, met pursuant to adjournment, and adjourned at the request of Mr. Ferguson for cross-examination of Mr. Clopfer at 12 o'clock.

Mr. CLOPFER recalled.

Cross-examination by Mr. FERGUSON:

Q. Mr. Clopfer, how many shares did you say you did take in this company?

A. My recollection is he took one share originally.

Q. Mr. Clopfer, didn't you sign the governor's certificate of the Commonwealth for 50 shares?

A. It seems from that paper that I have signed it. I have no recollection of signing it for 50 shares at that time.

Q. I ask you, sir, whether you didn't sign this certificate which I now show you, marked Exhibit No. 7?

A. That is my signature, undoubtedly; but it is not my recollection that I put down for 50 shares at that time.

Q. Didn't you also sign the affidavit and make oath that the statements in the certificate were true?

A. I believe so.

Q. Before Christ Cribbs, the recorder of Westmoreland county?

A. I don't recollect who it was before. I have no doubt that is correct.

Q. Didn't you ever pay any money?

A. Yes, sir; I did.

Q. How much money did you pay?

A. I paid $100, the original subscription.

Q. The shares were $100 each?

A. Yes, sir.

183 Q. And you paid in $100 then at the time of signing the certificate, did you?

A. I wouldn't be positive about that.

Q. Is that all the money you ever paid?

A. I gave my check for the balance of the 50 shares that I was induced to take afterwards, but it was understood——

Q. That would be $400 more—your check would be for $400 more than the $100——

By Mr. SCHOYER: $4,900 more.

A. It was understood that my check at that time was to be returned, or another check. It was not a *bona fide* subscription. I was induced by Mr. Semmer and the company to lend my name to it, which I am very sorry that I done—to allow my name to appear as a greater subscriber than I actually was, and gave my check for that money, and had my check returned, my recollection now is the same day.

Q. Where is that check?

A. I couldn't tell you, sir. I suppose it was destroyed; that would be my belief about it.

Q. Now, Mr. Clopfer, when was it that you took this one share?

A. It was at the inception of this thing.

Q. Before you signed this paper Exhibit No. 7, wasn't it?

A. I think so.

Q. How long before?

A. I couldn't tell you that.

Q. When was it that you were induced to take 50 shares, or subscribe for 50 shares?

A. It was subsequent to that some time, I think.

Q. Was it before you signed this certificate? The affidavit is dated the 1st day of August, 1890?

A. It was after that a considerable time that I agreed to take the 49 additional shares.

Q. Didn't you read this certificate before you signed and swore to it?

A. I must have read it; yes, sir

—. Then if you read it you know that you were stated as a subscriber for 50 shares, didn't you?

A. No, sir; I did not at the time.

184 Q. If you read it, you couldn't help but know it, could you?

A. I was quite careless in looking at the subscriptions.

Q. You must have been exceedingly careless.

A. Is this the original (indicating paper)?

Q. Yes, sir; that is the original paper. There is no doubt about that.

(Paper examined by witness.)

A. I am only giving my recollection—my belief now. I may be mistaken.

Q. Look at the paper and refresh your recollection.

A. That is original. There is no question about that. There is no change in this. This couldn't have been filled in afterwards, either. I must have been woefully careless, I think. I can't account for it any other way. Of course, Mr. Ferguson, I am only giving you my belief in this thing. I may be mistaken in this.

Q. Can you tell me whether you knew what the capital stock of the corporation was to be?

A. I think it was to be a million dollars.

Q. And you knew, didn't you, that ten per centum of the capital stock had to be paid in cash?

A. Yes, sir; I was told so at the time. I wasn't conversant with the law at these times, I don't suppose.

Q. You were told at the time that that had to be paid down by somebody in connection with the organization, didn't you?

A. I understood so at the time.

Q. Did you observe that this statement contained the allegation

that ten per centum of the capital stock had been paid in cash to the treasurer, George Cowan?

A. I think I did.

Q. Of course you are aware of the nature of an oath?

A. Yes, sir.

Q. And you swore, didn't you, that the statements contained in that instrument, including the statement that ten per centum of the capital stock had been paid in cash to the treasurer, were true?

A. I don't know.

185 Q. Do you say that you didn't?

A. I don't know.

Q. You paid in $100 in cash?

A. That was my recollection at the time.

Q. And you didn't get that back?

A. No, sir; I never got that back.

Q. Did you see other people paying up money?

A. No, sir.

Q. Did you know of others paying up actual cash?

A. No; I did not.

Q. Was there any statement made among yourselves at the time this paper was being signed and sworn to, as to what money had been paid by any one or more of them, so as to enable you to testify to or swear that $100,000 had actually been paid?

A. There was no evidence of that kind brought before me then. I can't recollect distinctly how it was, but I am satisfied in my own mind that I had some evidence from the treasurer or somebody else at the time that that amount had actually been paid in.

Q. You had evidence that was satisfactory to you that $100,000 in cash had been paid in at the time this certificate was signed and sworn to?

(Objected to by counsel for defendant.)

Q. You had information, had you not, then, at the time the paper was signed and sworn to, that ten per centum or $100,000 in cash had actually been paid to the treasurer, in which your $100, at least, was included?

A. I am not clear on that subject of how it happened or what evidence was produced to me; but I am certain, sir, that there was some evidence produced at that time to show that the laws had been fully complied with and that I was justified in signing it.

Q. How much was this check that you gave for?

A. My check was for $100.

Q. The other check?

A. That check was for $4,900.

Q. Sure of that?

A. Yes, sir.

186 Q. Was that check given before you signed and swore to this paper?

A. My recollection is it was not. It was afterwards.

Q. This water company—what was it?

A. The water company had no connection whatever with this

transaction, I believe. The North Irwin Land Company of which I was a member——

Q. You say now that the water company had no connection whatever with the organization of this corporation, or Penna. Plate Glass Company?

A. No, sir, I think not.

Q. The North Irwin Land Company was what?

A. It is the corporation that offered these inducements to Philip Semmer to locate his plant at that point—on their land.

Q. Where you connected with the North Irwin Land Company?

A. Yes, sir, I was. My object in going into this was owing to my connection with the North Irwin Land Company.

Q. Is that still in existence as a corporation?

A. Yes, sir.

Q. And has books and papers and offices?

A. Yes, sir.

Q. And whatever arrangement may have been made by that company with Mr. Semmer, or with the Penna. Plate Glass Company, or anybody connected with that glass company, is best evidenced, is it not, by the papers in the case?

(Objected to by counsel for defendant.)

Q. It is evidenced by papers, is it not?

A. I would think so.

Q. What position do you hold in the North Irwin Land Company, or did you at that time?

A. I think about an eighth interest.

Q. What position—were you president, vice-president or what?

A. I believe I was one of the directors.

Q. And you are perfectly solvent, Mr. Clopfer?

A. Yes, sir.

Q. Able to respond for 50 shares?

A. Yes, sir.

Q. At par?

A. I think so.

187 Q. Have you been released in any way since this litigation began, or has anybody attempted to release you, from your subscription?

A. No, sir.

A recess was here taken until 2 o'clock same day.

Met at 2 o'clock, pursuant to adjournment, at which session no testimony was taken.

And now, to wit, Friday, December 10th, 1897, met, pursuant to adjournment, at the office of H. D. Gamble, Esq., examiner.

Present: Same parties and C. A. O'Brien.

By Mr. SCHOYER: Do you appear in this case, Mr. O'Brien?

By Mr. O'BRIEN: I came down to advise Mr. Semmer, if it might be necessary for him to have advice, as to the propriety of his an-

swering all the questions that might be put to him in this examination.

*Testimony of Philip Semmer.*

PHILIP SEMMER, called on behalf of defendant and duly sworn, testified:

Direct examination by Mr. SCHOYER:

Q. Where do you live, Mr. Semmer?
A. At Irwin, Pa.
Q. Westmoreland county?
A. Yes, sir.
Q. Where is your place of business?
A. My office is room 28, Stevenson building, your city.
Q. What is your business?
A. I am at present engaged as a broker and commission man in glass.
Q. You were a witness, were you not, in the case of Philip Semmer and others against W. L. Kann in the court of common pleas of Westmoreland county, No. 977, May term, 1894?
A. I was.
Q. You knew the Penn Plate Glass Co.?
—. I did.
188 Q. You knew the firm of A. C. Boyd & Co.?
A. Yes, sir.
Q. Who composed that firm?
A. The firm of A. C. Boyd & Co. was composed of A. C. Boyd and myself in the proportion that I was $\frac{9}{11}$ owner and Mr. Boyd $\frac{2}{11}$, to the best of my remembrance.
Q. Was there, or was there not, anybody in interest in your $\frac{9}{11}$?
A. No, not in the partnership agreement. There was, however, a private arrangement between Mr. George Cowan and myself whereby he was to participate in a certain amount of my profits in consideration that he would practically back me up with an unlimited amount of money, or whatever money was necessary to carry on the operation of building the plant at Irwin.
Q. The partnership work of A. C. Boyd & Co.?
A. Yes, sir.
Q. How soon after the formation of A. C. Boyd & Co. did Mr. Cowan acquire that interest in your share? I don't mean just precisely, but was it a short time?
A. It was at the same time practically. The understanding existed between Mr. Cowan and myself that if the operation was undertaken that he would participate in my share of the profits.
Q. Do you recall when you and Mr. Boyd entered into the partnership?
A. I think it was in the early part of 1890.
Q. What was the purpose of that partnership?
A. The purpose of that partnership was to build and sell a plate-glass plant.
Q. Was there at that time any understanding between you and

Mr. Boyd to whom the glass works or plant that you proposed to build was to be sold?

A. There was an understanding existed that I was to form a company, and this company was to buy the plant.

Q. Well, was or was not that understanding had also by Mr. Cowan?

*Q.* Mr. Cowan also understood that was the intent of the firm of A. C. Boyd & Co.

189 Q. Do you recall, Mr. Semmer, the amount of the capital which the partnership of A. C. Boyd & Co. had at the time they entered into partnership?

A. The best of my remembrance——

Q. I mean put into the firm.

A. The best of my remembrance the contract was that, as I was owner of some 20 or 28 acres of land, worth about a thousand dollars an acre, and had contracted for supplies of water and natural gas at Irwin at a private figure, A. C. Boyd & Co. were to allow me for this land, gas and water, something like $50,000 for the ten years' gas contract, and, if I remember right, the land and water privilege were taken in for something like $20,000; in addition to that, I contributed $20,000 in cash, and Mr. Boyd, I think, contributed a a little more than $10,000, for which he was to have $\frac{1}{11}$ and I was to be $\frac{9}{11}$ owner. This $\frac{9}{11}$ I practically agreed with Mr. Cowan to share with him the profits. That is about as close as I can remember. This here one-half of my profits had nothing to do with Mr. Boyd, and in fact Mr. Boyd knew nothing of it.

Q. Then, as I understand it, the partnership was between you and Boyd, and the interest of Cowan was a simple venture in your individual interest in that partnership?

A. Cowan's interest was a venture in my interest in that partnership; yes.

Q. The land that you referred to was the land, was it not, which the Irwin Land Company gave you by deed in consideration of erecting a plate-glass works?

A. That is the land; yes, sir.

Q. And the water and gas were upon similar terms, were they not?

A. I can't recall the exact condition of the gas——

Q. I have the papers here. Will they refresh your memory?

A. The best of my recollection, the gas cost me a thousand dollars a year. I can't say positive.

Q. Your residence at that time was in New York, was it not?

A. It was; yes, sir.

190 Q. You were then engaged largely in what?

A. I was in the plate-glass jobbing business at that time.

A. And that brought you in contact with people in that line of business, I suppose?

A. Yes, sir.

Q. You may state, Mr. Semmer, whether or not, in pursuance of this plan A. C. Boyd & Co. to sell to a corporation which you were to organize, such a corporation was organized?

A. It was; yes, sir.

Q. By what name?

A. By the name of the Penn Plate Glass Company.

Q. I now hand to you an application for charter for that company, called Defendants' Exhibit No. 7, and ask you to look at it and say whether that is the application for charter of the company which you promoted?

(Witness examines paper.)

A. That is; yes, sir.

Q. I notice, too, Mr. Semmer, that in this paper, and also in Exhibit No. 8, which is a certified copy of the proceedings for an increase of indebtedness of the Pennsylvania Plate Glass Company authorizing $250,000 of bonds, that neither your name nor Mr. Boyd's nor Mr. Cowan's appears in either of those papers. Look at them and see.

(Papers examined by witness.)

A. Not in the application for a charter. Mr. Cowan's name seems to appear here for one share.

Q. Neither your name nor Boyd's, but Cowan's does?

A. A. C. Boyd & Co. appear here as subscribing 1,500 shares.

Q. The firm of A. C. Boyd & Co.?

A. Yes, sir.

Q. On the application for organization they do not appear. Can you give me the reason, sir, why the names of the partners of A. C. Boyd & Co. and those interested with them do not appear on the application for a charter? Was it because they were contractors?

A. That would be the natural inference, I should say.

191 Q. Who was your attorney in the organization of that company?

A. Mr. A. Livingstone Norman of New York.

Q. I wish you would state whether you had advice from him as to the question whether or not the contractors for the proposed corporation should have any official connection with the corporation?

A. I can't recall whether we ever consulted him on that policy or not.

Q. But you did so understand it, Mr. Semmer?

A. I would naturally infer that.

Q. I call your attention to a letter identified as Defendants' Exhibit No. 25, addressed to A. C. Boyd & Co., August 19th, 1890, and purporting to be signed by yourself, with interlineations in lead pencil, and ask you whether that is your letter?

A. It is a typewritten letter not signed by myself, but I judge from the general tenor of it I dictated it.

Q. Look at the lead-pencil interlineations. Perhaps you can recognize your handwriting?

A. No, no; there is no doubt whatever that I dictated it.

Q. I now call your attention to the first paragraph and have you read it.

(Paper examined by witness.)

Q. Now, having refreshed your memory, you may state whether or not, as early as August 19th, 1890, you understood and informed Mr. Boyd that the members of that firm could have no official connection with the company?

A. From the general tenor of that letter—I believe Mr. Boyd insisted upon being superintendent of the new company, and I advised him as a partner and associate, that I didn't consider it good policy for him to be identified with the company that we proposed to sell to until our contract was, at least, completed.

Q. I now ask you to look at a letter of July 19th, 1890, to A. C. Boyd & Co., purporting to be signed by you and marked as Defendants' Exhibit No. 33, H. D. Gamble; also, a letter, Exhibit
192 No. 34, dated August 21st, 1890, addressed to A. C. Boyd & Co. and purporting to be signed by you; and also a letter dated July 18th, 1890, being Defendants' Exhibit No. 35, H. D. Gamble, addressed to A. C. Boyd & Co. and purporting to be signed by you; and also a letter of October 6th, 1890, being Defendants' Exhibit No. 36, addressed to A. C. Boyd & Co., purporting to be signed by you; and Defendants' Exhibit No. 37, dated October 13th, 1890, addressed to A. C. Boyd & Co., purporting to be signed by you; and ask you if you identify those letters as having been written by you, or dictated, and your signatures?

(Witness examines letters.)

A. I suppose they were dictated by me; yes, sir.

Q. I now again ask you whether you had not been advised by Mr. Norman that neither yourself nor Mr. Cowan nor A. C. Boyd, for your own interest, could have connection with the Pensylvania Plate Glass Company officially, inasmuch as you were contractors?

A. I so advised Mr. Boyd in that letter. I can't recall, though, whether I did or not. Boyd was very persistent in being identified with the concern in some way or other, and I naturally didn't think it was policy for him to be appointed superintendent. Mr. Norman may, however, have advised me. I can't recall it.

Q. Now, in this letter, I wish you would read that last sentence.

(Letter shown witness, being letter of July 16th, 1890, Defendants' Exhibit No. 33.)

Q. I now ask you who Thomas McKee, who apparently was a subscriber for 4,717 shares of stock of the Pennsylvania Plate Glass Company, as recited in the application for charter, Defendants' Exhibit No. 7, was?

A. Mr. Thomas McKee was an intimate friend of mine, quite wealthy, and was to become largely identified with the new company—that is, the company to be formed, and was to be one of its incorporators and directors and officials.

193 Q. In point of fact was he a subscriber for 4,717 shares as an actual taker?

(Objected to by counsel for plaintiff for the reason that the application for the charter is the best evidence.)

A. It was so understood at the time. I don't know exactly what the number of shares were. Mr. McKee had subscribed to a very large amount; but, remember, he shortly afterwards died, after this subscription. I think very shortly after it,—a week or ten days. At least, he never attended more than one meeting at Irwin. I am quite sure of that.

Q. But, looking at the letter of July 16th, 1890, in which you state that you had a couple of dummies from New York to represent you, please state who those dummies were? Who represented you?

A. Will you let me look at the application for the charter again?

(Application for charter shown witness.)

A. I could hardly call Mr. McKee a dummy. He was to all intents a *bona fide* large subscriber. I think Mr. Norman represented me as one of these dummies, and I think Mr. Harrison represented Mr. Boyd as the other dummy.

Q. In point of fact, did Mr. McKee ever sign any written subscription for stock?

A. I can't recall whether he ever signed a subscription or not.

Q. Is it not true, Mr. Semmer, that the project of his going into the company was all prospective,—all in the future,—yet to be accomplished?

A. To a certain measure, yes; and then again, no. He was to become largely identified with the company, and there was a private arrangement between Mr. McKee and I that he was to have the right of purchase for a very large amount of the company's stock which we were to obtain as part payment on building the plant.

Q. What I would understand, then, instead of being a sub-
194 scriber for stock to the company, the arrangement was he had the option or right to purchase from you a certain amount of stock which you were to receive as contractors in part payment for building the plant?

A. That was the sum and substance of the understanding. As to how much stock later on he subscribed for, I can't recall.

Q. I now call your attention to Exhibit No. 36, referring to the illness of Mr. McKee, that letter being dated October 6th, 1890, and also one of October 13th, 1890, which you will please read, and then I will ask you some questions.

(Letters read by witness.)

Q. Now I ask you the question, what was the arrangement between you and Mr. McKee in regard to the stock?

A. It is so long back that I can't really recall.

Q. Refreshing your memory from these two letters?

A. I see nothing in that letter that would be in answer to your question.

Q. Let me then put the question in a different way. Is it not true, Mr. Semmer, that Mr. McKee was an apparent subscriber for stock under arrangement by which it was to be transferred either to

you or to A. C. Boyd & Co., or you and A. C. Boyd? (Referring to letter of October 6th, 1890.)

A. It seems so from the tenor of that letter that he was. As to what the arrangement was I can't recall.

Q. That is the point. I didn't expect you would. Now, the letter of October 13th, 1890, Defendants' Exhibit No. 37, H. D. Gamble, was written, was it not, after Mr. McKee's death?

(Letter shown witness.)

A. Yes; I seem to speak of his death there, and to advise Mr. Boyd that some plans would have to be arranged for transferring his $100,000 worth of stock, which he evidently subscribed for,—that a portion of it was to be transferred to us,—that is A. C. Boyd & Co.

Q. In that letter you mentioned that you had neglected to get a transfer or an assigment of the stock which he sub-
195 scribed, which might cause you a great deal of trouble at the present time in getting the bonds issued, as it was necessary to have the consent of all stockholders to issue the bonds without publication. Do you recall, too, Mr. Semmer, enclosing a blank transfer for Harrison to sign to be placed in either Mr. Boyd's hands or Mr. George Cowan's hands; and also that Mr. Wray Davis would sign a similar transfer, to make safe that the error wouldn't happen again?

A. I have refreshed my memory a bit on that letter, and I really believe that that $100,000 stock spoken of there subscribed for by McKee was really a *bona fide* subscription by Mr. McKee. What I seem to worry there about was that he died suddenly, knowing that he had died a bankrupt,—had met with financial losses before he died. Wall street seemed to have got on the wrong side of him, and I seem to worry there that his estate would be unable to make good his subscription. I knew that he was practically bankrupt. He left his affairs in a very bad mix. I seem to be worrying about his subscription.

Q. And you also worry about Harrison and about Wray Davis?

A. Well, in order not to have a thing of that kind occur again I seemed to have advised getting an assignment of their stock.

Q. Is it not true, Mr. Semmer, that Harrison was Mr. Boyd's dummy, to use your phrase?

A. I don't know positively, but I understood so.

Q. And Mr. Wray Davis was Mr. George Cowan's dummy?

A. That was what I understood. Mr. Davis was a clerk of Mr. Cowan's,—confidential clerk.

Q. Mr. Clopfer appears to be a subscriber for 50 shares, did you procure that subscription, and what was the arrangement?

A. I can't recall that subscription nor the arrangement. Mr. Clopfer was identified in the land company there at Irwin when I had made the contract with for the land that the plant was to be built on, and was a man of high standing in Westmoreland county, and
196 I was very anxious to have him as one of the incorporators; but as to what the arrangement was, I can't recall it.

Q. Don't you recall, Mr. Semmer (Clopfer has been sworn in this

case) that Mr. Clopfer was a subscriber for one share, and at your solicitation he put his name down for 50, and gave you his check for 49 shares, and that you returned the check the same day?

(Objected to by counsel for plaintiff as misleading for the reason that the question is prefaced with the statement that Mr. Clopfer was sworn; and, as a matter of fact, he didn't swear that he had given this witness his check. This witness does not seem to have been the treasurer of the company, and he would not have been the party to take the check.)

(Question withdrawn for the present.)

Q. Out of all these subscriptions, or those who purport to be subscribers to the stock of this company, please tell me who actually paid subscriptions in cash to the company?

A. I know nothing about it. I was neither treasurer of the Penna. Plate Glass Company, nor was I——

Q. I only ask you whether you know?

A. No; I know nothing about it.

Q. I now call your attention to a contract dated the 30th of August, 1890, between A. C. Boyd and Philip Semmer, partners composing the firm of A. C. Boyd & Co., and the Penna. Plate Glass Company, and bearing the apparent signature of yourself and A. C. Boyd, partners composing the firm of A. C. Boyd & Co., and the Penna. Plate Glass Company by C. W. Pool, under the seal of the company, being Defendants' Exhibit No. 11, H. D. Gamble, and ask you if you recognize that as the contract made with the company for the construction of the plant?

A. That is the contract.

Q. Now, looking at the contract and its terms of payment to you in stock, so far as it is in stock. How could this company have complied with this contract in giving you stock if these subscrip-
197 tions were in good faith already made to the full extent of the capital stock of the company as set out in the application for a charter?

A. The best of my remembrance of this contract in a general way was we were to receive $850,000 for the plant, of which $250,000 was to be in cash, $250,000 in bonds, and the balance in stock, which would make about $300,000 in stock,—$350,000 in stock. Some of this stock subscribed by Davis and Harrison naturally would have to be put back for the company to comply with this contract, I should judge, or released in some manner. If I recall rightly, the amount was subscribed for the purpose of making a close corporation; and A. C. Boyd & Co., as I stated before, had make arrangements with certain other parties to buy some of the stock.

Counsel for defendant now offer, in connection with the *the* testimony of the witness, Defendants' Exhibits, H. D. Gamble, Nos. 33, 34, 35, 36, 37, and also Defendants' Exhibit No. 11.

(Objected to by counsel for plaintiff as being incompetent and irrelevant under the pleadings, and generally.)

Q. I now hand you Defendants' Exhibit No. 66, H. D. Gamble,

dated 10th day of June, 1890, between C. W. Pool and Louisa L., his wife, of the one part and George Cowan and Philip Semmer of New York, parties of the second part, purporting to be signed by C. W. Pool and Louisa L., his wife agreeing to convey 20 acres of land described by metes and bounds and distances and courses, and ask you if that is the paper under which you acquired title to the land of which you have already spoken in your testimony today?

(Paper examined by witness.)

A. I think there was a subsequent agreement to this.

Q. I am not speaking about that. There is one; but that paper is genuine, isn't it?

A. It would seem so. I speak of the transaction, but if I recall correctly, the transfer was made to myself. Mr. Cowan didn't appear in the transaction; and then I think there was an additional
198 acreage. We found that 20 acres wasn't large enough, and an additional acreage was contracted for. I would rather take it for granted that was a rejected agreement. It may have been some old document that Mr. Boyd got possession of that wasn't destroyed.

Q. I will withhold the offer of this for the present. In the meantime, I hand to you Defendants' Exhibit No. 65, purporting to be a contract dated June 16th, between the Irwin Natural Gas Co. and Philip Semmer of New York, in regard to natural gas, and also a supplemental paper connected therewith.

A. It seems to be a gas contract. I guess there is no question about that.

Counsel for defendant offer Exhibit No. 65, in evidence in connection with the testimony of the witness.

(Objected to by counsel for plaintiff, for the following reasons:)

First. That there is not sufficient proof of the execution of it.

Second. As incompetent and irrelevant generally, and incompetent and irrelevant under the pleadings.

Q. You recognize your signature?

A. That is my signature. I didn't read over the contract. In a general way I glanced over it.

Q. I don't want any doubt about that. You had better look at it and see whether you are able to say whether that is the gas contract.

A. It is so long back I couldn't recall it, Mr. Schoyer.

(Paper examined by witness.)

A. It may possibly be that there was a subsequent contract——

Q. I am asking you whether that is genuine as of that date?

A. At that date it seems to be so, yes. I am, however, under the impression that either the gas or water cost me something like a thousand a year.

(Objection renewed by counsel for plaintiff.)

199 Q. I now hand to you a bond dated the 13th of June, 1890, by you, to C. W. Pool, and being Defendants' Exhibit 63, and ask you whether that is your signature.

A. That is my signature.

Q. You notice that is the 13th of June, and the deed that you thought subsequently followed was the 10th of June.

(Paper examined by witness.)

Q. I now ask you whether or not the exhibit, being a conveyance of the land, dated the 10th of June, and about which you had some doubt that that had been followed by a subsequent arrangement——

A. I think still to the best of my remembrance, there was some subsequent arrangement. As to what it was, I can't now recall.

Counsel for defendant here offered in evidence Defendants' Exhibit No. 63.

(Objected to by counsel for plaintiff as generally incompetent and irrelevant, and especially so under the pleadings.)

Q. In these articles of association, or application for a charter, it is stated that the amount of the capital stock of said company is a million dollars, divided into ten thousand shares of the par value of one hundred dollars; and that one hundred thousand dollars, being ten per centum of the capital stock, had paid it in cash to the treasurer of the said corporation, whose name and residence are George Cowan, New York city and State of New York. What do you know about that one hundred thousand dollars having been paid in?

(Objected to by counsel for plaintiff for the reason that it appears that the witness was not one of the three parties making the affidavit attached to the application for a charter.)

Q. Note that I ask the witness only what he knows about the one hundred thousand dollars being actually paid in in cash to the treasurer on the date of the application for this charter, that being dated first of August, 1890.

A. The first of August, 1890? I was neither treasurer of
200 the company nor had the handling of the funds in the hands of *of* A. C. Boyd & Co., which Mr. George Cowan had charge of under our contract.

Q. That I know? I don't mean to intimate anything of that kind; but I only want what you know as to whether or not on that date one hundred thousand dollars in cash had been paid on these subscriptions?

A. In a general way. I was advised by Mr. Cowan——

By Mr. FERGUSON:

Q. What you know yourself. Not what anybody told you.

A. A. C. Boyd & Co. paid in that 10 per cent. that day by check for that amount to the best of my remembrance.

By Mr. SCHOYER:

Q. Was that check cashed?

A. I do not know how Mr. Cowan cleared or cashed the check, or where it was cashed. I know, however, that we didn't question Mr. Cowan's handling our funds. He was a man of unlimited means, and I am under the impression that it was paid by a check on the Irwin bank drawn by him on that bank.

Q. And you had the funds in bank to meet that check?

A. I know nothing of it. Mr. Cowan had all of our funds in charge. He had accounts in New York, Pittsburgh and Irwin, and I believe other banks at the time. As to how the check was given, paid or cleared, I can't recall.

Q. I hand to you now a check dated August 30th, 1891, on the Farmers' and Miners' Deposit Bank of the Penna. Plate Glass Company, George Cowan, treasurer, to the order of A. C. Boyd & Co., for one hundred thousand dollars, endorsed A. C. Boyd, per George Cowan, attorney, and now marked Exhibit No. 67, and ask you whether or not the firm of A. C. Boyd & Co. got that money, or whether or not it was not a mode of balancing the ten per cent. that had been deposited to the credit—that appeared to be deposited to the credit of the Penna. Plate Glass Company in that bank?

A. I know nothing about that check. As I have said several times, Mr. Cowan had the entire handling of both A. C.
201 Boyd & Co.'s funds and that of the Penna. Plate Glass Company. I am under the impression, however, that that check was the first payment on our contract. I am not positive.

Q. You have not looked to see whether that check was not afterwards absorbed in stock issued to A. C. Boyd & Co.

A. I have no positive knowledge as to that.

Q. How much did you (A. C. Boyd & Co.) altogether receive from the Irwin Plate Glass Company and in what?

A. Two hundred and fifty thousand dollars of bonds. We received them positive. I know that.

Q. How much stock?

A. I can't recall the exact amount of stock. I know we had to take a great deal more stock than our contract called for.

Q. Naturally, Mr. Semmer, having entered into this arrangement to build a glass plant, the firm of A. C. Boyd & Co. looked around for money?

A. Why, I suppose so. We had four hundred hands building at the time, and it kept me hustling. I remember that.

Q. Do you recall a prospectus inviting loans—a builder's loan of $80,000?

A. In a general way I recall something of that kind. I don't remember the facts of that.

Q. I now hand to you a circular marked Exhibit No. 68 and call your attention to its contents, except the last paragraph, and ask you, having read it, whether you recall such circular—not this one, but such a circular—having been made by A. C. Boyd & Co. for the purpose of borrowing money?

A. I have no recollection of that ever being issued by us. I think it was the synopsis of a letter drawn up by me that got into the hands, accidentally, through a banker in New York who thought he was doing us a favor, and got into competitor's hands, and may possibly have been printed; or we may have printed that. In fact, it was a letter I have a recollection of compiling myself before the operation was started at a time when I had a very vague idea as to the cost of the plant. We found that the plant cost us a great
202 deal more money than stated there. This is only a rough sketch for the sake of negotiating a loan—making it as plausible as possible.

Q. This was substantially a correct statement of your letter?

A. I couldn't say it was a correct statement, although I am inclined to think it was printed from a letter I elaborated. I recognize some of the features of the letter.

Counsel for defendant now offer Exhibit 68 in evidence in connection with the testimony of the witness.

(Counsel for plaintiff object to the offer of Exhibit No. 68 for the reason that it has not been identified by the witness as having been issued by the firm of A. C. Boyd & Co.; and as being incompetent and irrelevant under the pleadings and in general.)

Q. I now hand you Exhibit No. 12 and ask you if you recognize the handwriting of Mr. Boyd—or whose handwriting it is, if you know?

A. It had not got Mr. Boyd's signature.

Q. But do you know whose handwriting is it?

A. I couldn't swear to that. It looks something like Mr. Boyd's handwriting. He never wrote a fixed hand. In a general way, it would seem to be a proposition from Boyd to Beamer for building plate-glass works. There is no doubt of it. I think it must be long after our connection in erecting the Irwin plant.

Q. Then you think that does not apply to the Irwin plant?

A. I should say so—that is *the* something entirely different. It don't seem to agree with our specifications there at Irwin. I am sure that our annealing ovens are 22 feet wide, and this speaks of 52-feet-wide annealing ovens here. I think it is something entirely different from the Irwin plant.

Q. You knew Mr. James Beamer?

A. I did; yes, sir.

Q. He became connected with the company, did he not, as a stockholder and officer of the Penna. Plate Glass Company?

A. Yes; Mr. Beamer became shortly after its incorporation its vice-president, I think.

203 Q. Did you or did you not have any interviews with Mr. Beamer about the time of the organization of this company, or the formation of A. C. Boyd & Co., to elicit his interest, pecuniarily or otherwise, in your undertaking for the erection of a plant at Irwin?

A. To the best of my remembrance, I did not become acquainted

with Mr. Beamer until some two or three weeks after the organization of the company.

Q. And where then did you meet him?

A. At his office in the Lloyd Plate Glass Insurance Company in New York, of which he was president.

Q. Who sought the interview, you or he?

A. I think I was introduced to Mr. Beamer by Mr. Hutkopf of New York, who was a mutual friend of us both. I believe Mr. Hutkopf advised me after we had started that Mr. Beamer might become interested in the company. On the strength of that I asked him, I believe, to introduce me to Mr. Beamer, which he shortly after did.

Q. What passed between you and Mr. Beamer at that time in regard to this matter?

A. At our first interview?

Q. Yes.

A. I can't recall, but it is quite likely that the matter of his be coming identified with the company was talked of. As to what was said I can't recall.

Q. Was there an explanation made about the plan of operations through A. C. Boyd & Co. and the stock and bonds?

A. No, sir; positively not. As to explaining the affairs of A. C. Boyd & Co., he knew nothing of the affairs of A. C. Boyd & Co.

Q. Was there nothing said about A. C. Boyd & Co. being the contractors and to receive stock and bonds for building the plan?

A. Yes; there is no question as to—there is no question about it. I must have advised him at the time that we were contractors and proposed to erect the plant and equip it complete and deliver it to the Penna. Plate Glass Company.

204 Q. You to receive bonds, stocks and cash?

A. Stocks, bonds and cash.

Q. Was your proposition that he should become a purchaser of bonds and stock from you, or what was the proposition which you suggested to him?

A. I can't recall the exact proposition at the time. In a general way I remember having sold Mr. Beamer bonds and stocks. As to what took place at the first or subsequent interviews, I can't recall. I know I sold Mr. Beamer quite a number of bonds and a great deal of stock which we had for sale, having taken it as payment on construction as the first payments came due. We were, as the erection went on, to receive whatever cash the company could spare, according to the contract, in installments, and receive bonds and stock.

Q. Was he advised of the terms of payment which the company was to make to A. C. Boyd & Co.?

A. In a general way, I presume he was,—that we were to receive cash, bonds and stock as payment and erect the plant complete.

Q. Well, your object was, was it not, to have him purchase bonds and stock?

A. That was the object; yes, sir.

Q. At the time of this conversation, bonds had not been issued?

A. Unless you refresh my memory as to dates with some of those

letters of yours, of which I don't doubt you have got them all, I couldn't tell.

A recess was here taken until 2 o'clock, p. m., same day.

*Afternoon Session.*

Mr. SEMMER recalled.

Q. Now, Mr. Semmer, I want to get your mind back again to the first interviews you had with Mr. Beamer, and the information which you gave to him about the project of A. C. Boyd & Co. to build works for sale to the Pennsylvania Plate Glass Company and the enlistment of others in the purchase of bonds and stock
205 so as to enable you or your firm to carry out your plan. First, I will ask you whether you were not very actively engaged representing the firm of A. C. Boyd & Co. in procuring means to carry on your projected plans?

A. The fact is, I did all the manipulating as to gathering the funds and getting parties interested. I think that neither Mr. Boyd nor his influence ever contributed one cent outside the money that he put into the firm, and outside of the actual building and making the contracts; for the sale of stock, bonds and raising money in general was entirely in my hands; and as fast as these negotiations were made, the proceeds were entrusted to Mr. Cowan, who acted as trustee for A. C. Boyd & Co. A. C. Boyd nor myself paid no bills. They were all made out by voucher by Mr. Cowan. He would issue checks for the payment.

Q. And in the process of that work of yours, in manipulating the finances which you have described, you were brought into contact with many persons, I suppose?

A. Quite a number, yes.

Q. And among others Mr. Beamer?

A. Yes, sir.

Q. What I want to know from you, Mr. Semmer, is whether or not Mr. Beamer had been fully advised by you of the entire scheme of A. C. Boyd & Co. as contractors to build these works and to then convey the same to the Penna. Plate Glass Company, or a corporation to be organized for that purpose, and the contractors then to be paid in bonds and stock and cash, to the end that he might invest in the bonds and stock which A. C. Boyd & Co. would subsequently get.

A. To the best of my recollection this scheme had already been consummated some three or four weeks before my first interview with Mr. Beamer. That is the best of my remembrance. I am almost sure Mr. Beamer did not attend the organization meeting, which was the first meeting at Irwin. He did not appear on the scene till some weeks after, and the best of my remembrance the contract was signed at this organization meeting, and Mr.
206 Beamer knew nothing of it until he appeared some two or three weeks later. That is the best of my remembrance.

Q. Did you or did you not inform him and show him the con-

tract which you had with this company to the end that he might become interested in the bonds and stock?

A. I showed him no contracts whatever. I simply told him that I was building a plate-glass plant at Irwin and had made a contract with the Penna. Plate Glass Company for $850,000—so much in cash, so much in bonds and so much in stock, and would very much like to have him go out and look into the scheme so far as we had gone and look over the plant which was under way, with a view of getting interested. Mr. Hutcupf, I believe, was at that time interested, or was about to become interested, pending the decision of Mr. Beamer. Mr. Beamer came out and inducements were held out to him to accept the vice-presidency on the salary which, I think, was $2,500 a year. Mr. Beamer accepted the position, we expecting, of course, a man in his position as president of the Lloyd Plate Glass Insurance Company could be a benefit to us. As to just exactly what private arrangements were made after that with Mr. Beamer so far as the selling of stock and bonds are concerned, I have no exact recollection. He simply considered that the project looked promising and he went in there on a salary. That is, I believe, the way he looked at it at the time. Subsequently thereto he bought considerable stock and bonds. Most of it contracted with myself—that is, stock of A. C. Boyd & Co. I believe he bought something like fifty or sixty thousand dollars' worth of bonds from A. C. Boyd & Co.

Q. Do you recollect the prices at which he bought the bonds?

A. I am not positive. I know one parcel that he paid 95 per cent. for. In other words, we allowed him 5 per cent. commission for placing them; and another parcel went as low as 80 per cent. I think that was the lowest that was paid for any of the bonds.

207 Q. And the stock—do you recollect the prices for the stock?

A. Some of the first stock he bought on his first entering the company I believe he paid 100 cents on the dollar for. Shortly after, after the plant was nearing completion, we needed money very much, and it was during the 1891 little short panic that we were ready to make almost any kind of sacrifice to raise money to carry out our contracts. I believe we sold Mr. Beamer some very cheap stock, but as to how cheap we sold it I can't recall.

Q. This conversation that you have referred to first, before he became interested, took place before the procedure for the issuing the bonds taken by the company, did it not?

A. I am not positive about that. The minute book would tell that part of the history.

Q. But your first conversations with Beamer were before the proceedings of the meeting of the company to issue the bonds?

A. If you will refresh my memory upon the date of that, I may be able to tell.

Q. Witness' attention is directed to the certified copy of the proceedings for issuing of bonds, Exhibit No. 8, at a meeting held on the 15th day of November, 1890, in which Mr. Beamer appears at that time as a holder of fifty shares. A meeting was called for the

purpose of authorizing the bonds to be issued, and there Mr. Beamer appears to be a holder of fifty shares.

A. It is quite evident Mr. Beamer was a director and stockholder at the time.

Q. And the conversation referred to was, then, prior to this date as shown by this paper?

A. Yes, sir.

Q. Did Mr. Beamer come out to Irwin after your conversations?

A. He shortly after the first interview came out to investigate the property and look into the affairs of the company generally, and it was quite evident he was satisfied, as he had agreed to accept the vice-presidency, and made a private agreement with myself to take a certain amount of stock and bonds, I believe at the first trip to Irwin. It was at the day fixed for the regular meeting, I
208 believe; but as to the date of the meeting, I believe the minute book will show.

Q. I think I have a letter of yours that may fix the date. I now hand you papers marked for identification as Exhibits 70, 71 and 72, which you may read for the purpose of refreshing your memory as to the dates about which inquiry has been made. These letters were at your dictation and the signatures in your handwriting?

A. Yes, sir.

Q. The Exhibit 70, being dated October 29th, 1890, addressed to A. C. Boyd & Co. by Philip Semmer, the witness; Exhibit 71, being dated November 1st, 1890, addressed to A. C. Boyd & Co. and signed by the witness; Exhibit No. 72, being dated November 18th, 1890, and addressed to A. C. Boyd & Co. and signed by the witness. Now, can you recall by the aid of these letters about what time it was that Mr. Beamer came out to make an inspection of the proposed plant with reference to investments?

(Letters shown witness.)

A. From this letter it appears that Mr. Beamer was to have come out the following week from November 18th.

Q. And — the best of your recollection, he did, I suppose?

A. I am not positive about whether he did or not, but it would seem to me the records of the company would show that.

Q. I only want to get your own recollections, refreshed by your letters which you wrote at that time. It was about that time that Mr. Beamer came out?

(Objected to by counsel for plaintiff for the reason that the witness has repeatedly said he could not remember.)

Q. Refreshing your memory from these letters, what is your best recollection of the time that Mr. Beamer came out to make the inspection of which you speak in your testimony?

A. November 8th—that is, I speak of it there. I should judge he came out some time before the new year—between that and that time.

209 Q. Did he not come out before the meeting for the bonds?

A. What was the date of that letter? I forget now.

Q. November 18th.

A. On what date was the resolution passed?

Q. The resolution was passed by the board of directors some time before, in October; but the waiver waiving the sixty-day notice was November 15th, 1890, and that was signed by Mr. Beamer?

A. That is November 16th?

Q. November 15th. Look at October 29th and November 1st. Your speaking about him coming out November 18th has nothing to do with it. All I want is as near as you can get, refreshing your memory from these letters, about the time he came out to inspect the property.

A. I should judge between that date and the date of this letter. I seem to speak of——

Q. That is between November 1st and November 18th?

A. Yes; I believe that is the first time Mr. Beamer came to Irwin.

Counsel for defendant here offers in evidence Exhibits No. 70, 71 and 72 in connection with the testimony of the witness.

(Objected to by counsel for plaintiff for same reasons given before.)

Q. Mr. Hutcupf came along, didn't he?

A. Yes; Mr. Hutcupf, I believe, was with Mr. Beamer at the time. We carefully went over the ground. By that time we had considerable work under way and the plant made a very good impression. It was a large plant. As to any further inspection outside of the plant I know nothing. As to whether he looked into the books or affairs of the company, I had nothing to do with that.

Q. Do you recall whether or not inquiries were made by him as to the probably real cost of the works so as to satisfy himself that his investments would be well based?

210 A. Oh, no. That would not be unusual, though. I know of no such inquiry.

Q. It is true, is it not, that these letters correctly represent the substance of interviews which you had with Mr. Beamer—Exhibits 70, 71 and 72?

A. In a general way I advised Mr. Boyd what was under way there.

Q. You undertook to correctly represent in these letters the substance of the interviews you had with Mr. Beamer and Mr. Boyd?

A. Yes, sir.

Q. Mr. Hutcupf did take stock in the company?

A. Yes, sir.

Q. And Mr. Beamer did make an investment in the company and was elected to the vice-presidency and satisfactory terms were made with him?

A. Yes, sir.

Q. Do you recall what those terms were that were made with Mr. Beamer referred to in this Exhibit 71, November 1st, 1890?

A. I can't recall exactly; no.

Q. In your subsequent transactions with Mr. Beamer, were they conducted by Mr. Beamer with you or Mr. Boyd or Mr. Cowan, rep-

resenting the contractors, except so far as Mr. Beamer was an officer of the company—I mean raising money, buying bonds or selling stock?

A. I believe that I negotiated all the stock and bonds sold to Mr. Beamer, with possibly the exception of the first subscription. I can't recall how that was handled.

By Mr. O'BRIEN.

Q. Do you mean as representing A. C. Boyd & Co.?

A. Yes, sir; sold as A. C. Boyd & Co.'s stock and bonds.

By Mr. SCHOYER:

Q. I wish you would look at the following exhibits. Defendants' Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31 and 62, and state whether or not those letters were written or dictated by you.

A. Shall I read them all?

Q. Just look at your signatures. You can tell from that.

211 There is no use taking the time to read them.

A. I seemed to have signed all those letters.

Q. Those are all signed by you?

A. Yes, sir.

Counsel for defendant offers in evidence the exhibits above named in connection with the testimony of the witness.

(Objected to by counsel for plaintiff for same reasons stated in former objection.)

Q. A. C. Boyd & Co. had a contract with A. J. Sweeney & Sons, did they not, of Wheeling—a subcontract for some part of the work?

A. Yes.

Q. Do you recall receiving a letter from P. C. Knox, dated June 1st, 1891, directed to A. C. Boyd, Esq., Irwin, Pa., referred to in some correspondence which I will show you, but that letter shown being part of Exhibit 32?

A. I don't remember of ever seeing that letter addressed to Mr. Boyd. Mr. Boyd may have received such letter.

Q. And I also show you a letter from Mr. Knox addressed to A. C. Boyd, dated June 5th, 1891, on the same subject, returning cancelled certificates 94 and 95, and also referring to letter of June 8th, 1891, to A. C. Boyd & Co., both being part of Exhibit 32; and, also your letter of June 6th, 1891; and then ask you to say whether you did not see those two letters of Mr. Knox's or copies of them?

A. Mr. Boyd may have sent me copies of those letters; but I can't recall it, though.

Q. Except as aided by your letters?

A. Yes. I must have written Knox & Reed according to my letter of June 6th, but I can't at this time positively say that I ever saw those letters. Mr. Boyd received both of those.

Q. You observe in one of those letters you acknowledge having received a copy?

A. I don't deny that I either seen them or a copy, because I

speak of it here, but I can't recall having seen those two letters addressed to Mr. Boyd. I may have received a copy. It is quite likely I received a copy.

212 Q. You made an adjustment, did you not, with Mr. Knox?

A. I can't recall now the matter. Sweeney had no claims on A. C. Boyd at this time as I know. It must have been settled in some matter. As to how it was settled I can't recall. I know at the time we thought it was a very shabby trick for them to back out of a contract to take a certain amount of stock which he knew all about.

Q. I now ask you to say whether the letters of June 6th, 1891; May 29th, 1891; April 30th, 1891; June 8th, 1891, and June 6th, 1891, being the second letter of that date, all forming part and parcel of Defendants' Exhibit 32, and addressed by you to A. C. Boyd & Co., except the second letter of June 6th, 1891, addressed to Messrs. Knox & Reed. Were they dictated by you?

A. I signed all of those letters, yes.

Counsel for defendant now offer in connection with the testimony of the witness, Exhibit 32, inclusive of letters to which his attention has been directed.

Counsel for plaintiff makes the same objection heretofore made.

Hearing here adjourned until 2 o'clock p. m. Monday, December 13th, 1897.

And now, to wit, Monday, December 13th, 1897, met pursuant to adjournment at the office of H. D. Gamble.

Present: S. Schoyer, Jr., attorney for defendant; E. G. Ferguson, attorney for plaintiff, and C. A. O'Brien.

*Testimony of J. W. Stoner.*

J. W. STONER, called by defendant out of order, testified:

Direct examination by Mr. SCHOYER:

Q. Look at the books before you and state if you recognize them as books belonging to the Pennsylvania Plate Glass Company and used in their business.

A. I do.

Q. Look at book called Ledger "A," now marked Exhibit

213 73. That book is what?

A. This is the regular ledger in which all our accounts were kept. The Pennsylvania Plate Glass Company's regular ledger.

Q. And the other book?

A. Is their cash book, in which their memoranda of all cash were kept, and it is marked "A" also—Cash Book "A," Exhibit No. 74.

Q. What is that other book there?

A. This is simply an index to the ledger, Exhibit 75.

(Counsel for plaintiff object to all the testimony of this witness generally as incompetent and irrelevant, and especially as incompetent and irrelevant under the pleadings.)

PHILIP SEMMER recalled.

Direct examination resumed by Mr. SCHOYER:

Q. Mr. Semmer, I hand you Defendants' Exhibit No. 1, H. D. Gamble, examiner, and ask you if you recognize that as the minute book of the Penna. Plate Glass Company?

A. That seems to be the minutes up to the time the sheriff took possession.

Q. The last minute is March 14th, 1894?

A. Yes, sir. I noticed that date.

Q. I now hand you a letter addressed to A. C. Boyd & Co. by A. C. Boyd & Co., per George Cowan, dated January 14th, 1891, Defendants' Exhibit No. 41; a guaranty signed by George Cowan, dated August 9th, 1892, Exhibit No. 40, H. D. Gamble; a proxy of George Cowan witnessed by yourself, dated December 22nd, 1892, Exhibit No. 42; and a letter dated December 18th, 1891, Exhibit No. 45, purporting to be signed by George Cowan; Exhibit No. 44 dated June 17th, 1892, addressed to A. C, Boyd, purporting to be signed by George Cowan; Exhibit No. 45, dated October 21st, 1892, addressed to A. C. Boyd, purporting to be signed by George Cowan;
and ask you whether you recognize the signatures, George
214 Cowan to those letters, and the handwriting, if you can, but especially the signatures.

A. Those are signed by George Cowan.

Q. Mr. Semmer, do you recollect how the apparent title of McKee's estate passed out of McKee's estate to the stock?

A. No; I can't recall that.

Q. Whether it was by written transfer?

A. I can't recall how the matter was arranged. Mr. McKee died suddenly, as I testified the other day, and his affairs were left in a very mixed-up shape, and how the transfer of title was made I can't recall.

Q. Did you attend to that part of the business?

A. What part?

Q. The transfer out of the estate?

A. I haven't the least recollection about it.

Q. Was it ever transferred?

A. I think it was.

Q. It went principally, did it not, to Wray E. Davis first?

A. I can't recall unless you should be able to refresh my memory.

Q. I'll not bother with that.

A. I presume the stock book will show that better than I could.

Q. I hand to the witness a letter dated July 1st, 1890, to A. C. Boyd & Co., signed Philip Semmer, marked Exhibit 76, and one of July 25th, 1890; No. 77, similarly addressed and signed; and one of July 20th, 1890, Exhibit 78, similarly addressed and signed; and one Exhibit 79, dated October 4th, 1890, similarly addressed and signed; Exhibit 80, October 14th, 1890, similarly addressed and signed; Exhibit 81, dated December 9th, 1890, similarly addressed and signed; Exhibit 82, dated December 13th, 1890, similarly addressed and signed; Exhibit 83, dated January 13th, 1891;

Exhibit 84, dated January 22d, 1891; Exhibit 85, February 18th, 1891; Exhibit 86, dated March 24th, 1891; Exhibit 87, dated April 17th, 1891; Exhibit 88, dated May 29th, 1891; Exhibit 89, dated June 15th, 1891; Exhibit 90, dated June 25th, 1891;
Exhibit 91, dated June 29th, 1891; Exhibit 92, dated
215 July 1st, 1891; Exhibit 93, dated July 1st, 1891; Exhibit 94, dated August 1st, 1891; Exhibit 95, dated August 1st, 1891; Exhibit 96, dated September 26th, 1891; Exhibit 97, dated October 2d, 1891; Exhibit 98, dated February 5th, 1892; Exhibit 99, dated November 5th, 1892; Exhibit 100, without date, addressed to A. C. Boyd & Co., signed "D. S.," and ask you whether those letters bear your signature?

A. Those letters bear my signature, or the signature dictated by me.

Q. I also hand you a paper marked Exhibit 101, and ask you if you can state whose handwriting that is in.

A. I have no idea whose handwriting that is.

Q. I now hand you Exhibit No. 102 and ask you whether or not that is the subsequent deed for the real estate which you referred to in your testimony last week.

A. This don't bear my signature, but seems to refer to a water contract.

Q. You recognize it as such?

A. I am not positive, but it seems to be.

Q. To the best of your recollection, you believe it to be?

A. To the best of my recollection, something to that effect.

Q. I also show you a treasurer's report, February 5th, 1891, Exhibit 103, and ask you if you recognize the writing and signature of George Cowan to that paper?

A. That is Mr. Cowan's signature.

Q. I now turn your attention to a letter book called Defendants' Exhibit No. 9, and ask you to read those letters and estimates and see whether you have received that.

(Objected to by counsel for plaintiff for the reason that the letters shown the witness are impression copies and not original letters, and there is no sufficient proof of the correctness of the letter-press copy book.)

Q. You recognize the writing, I suppose, as that of Mr. Boyd?

A. I recognize the book as a whole as Mr. Boyd's handwriting.

Q. Well, that particular letter?

216 A. I shall read it and see if I can remember anything about it.

Q. Well, what is your answer?

A. I recognize in that estimate, approximate estimate made by Mr. Boyd a year before the plant was completed, but that had no bearings on the cost whatever. I think the plant cost something like one hundred or one hundred and fifty thousand more.

Q. I didn't ask you that.

A. I recognize it to be the early approximate estimate of the cost in order to guide myself as to how much money had to be raised.

It don't cover the entire construction. The electric plant is entirely out, and a great number of other details are not included there whatever.

Q. I now hand to you a paper, Exhibit 104, purporting to be a description of the proposed plate-glass works, and ask you if you recognize that as one of the typewritten prospectuses for a builder's loan issued by A. C. Boyd & Co., or A. C. Boyd and yourself.

A. I don't recognize that. It bears no date, and it may have been a preliminary memorandum drawn up of something that wasn't to be sent out. The best of my recollection, this memorandum was drawn up about a year before the date of starting operations at Irwin.

Q. It purports to be an application for a builder's loan evidently.

A. It don't represent the plant at Irwin.

Q. Oh, I understand that. I don't mean it for that; but this was an application for a builder's loan before you constructed the works, or before you formed the company?

A. I can't recall the paper except in a general way; I see it speaks of Mr. Boyd going to build the works. That is about the only thing I can (interrupted)——

Q. You recollect the estimates?

A. No; I don't. It is a ridiculous estimate to commence with for one who has gone through the operation.

Q. But this was before you went through, Mr. Semmer?

217 A. In a general way I recognize it as a memorandum drawn up on which no action was ever taken, or application I don't think ever made for a loan. After consideration, I don't think that document ever went into effect or was issued, and somebody may have got a hold of it. In a general way, I recognize it as having been drawn up by myself. I don't think it was ever made use of.

Counsel for defendant offer in evidence Exhibit 104 in connection with the testimony of the witness.

(Objected to by counsel for plaintiff for the reason that it bears neither date, signature or other mark of identification; and for the further reason that the witness is unable to identify it; and generally that it is incompetent and irrelevant.)

Q. Do you recollect, Mr. Beamer, who succeed- Mr McKee on the board of directors?

A. I do not.

Q. Do you recollect when A. Livingston Norman resigned as a director?

A. I recollect that he resigned at one time, as to when I don't know. He was a director at one time, but I know at the last existence of the company he was not, so he must have resigned; as to what date I can't recall.

Q. Mr. Semmer, you would have no better means of noting the official connection of Beamer with the company than what the minute books show as to date?

A. No, I wouldn't.

Q. What connection had A. C. Boyd & Co. with the Irwin Natural Gas Company?

A. After or during the period of our construction at Irwin, we found that gas was giving out, and we became greatly alarmed as to the company being able to supply the amount of gas they agreed to furnish to operate the plant. In order to make sure of not a shortage (we were somewhat afraid that they would supply the small consumers first and not the glass works), we bought the controlling stock of the company. That was probably a year after we started operations that we bought the controlling interest in the Irwin Natural Gas Company.

218 Q. Was it before or after you bought the controlling interest in the gas company that that contract was cancelled with the Penna. Plate Glass Company?

A. The contract was cancelled only in the way of the gas giving out. I don't think the contract was ever cancelled in any other way.

Q. What interest had A. C. Boyd & Co. in the water company?

A. None whatever. The gas contract, to the best of my knowledge, is still in existence, but there is no gas company nor gas there. The gas company finally went into liquidation some way or other.

Q. Mr. Beamer continued to take an active part, did he not, in the company after he first became a director down until the time of the receiver's sale?

A. I believe Mr. Beamer was a director from his first election until the plant was closed.

Q. He took an active part and generally attended?

A. Well, not very active. Sometimes I think four months would pass before he would attend a meeting, but he was a director during all that time.

Q. I see by some of your letters which I will offer in evidence that you sold bonds down to 75 per cent.

A. I think there was one parcel sold to Mr. Fulton as low as that. I think that Mr. Beamer did not pay less than 85. I believe that is the lowest that I sold Mr. Beamer. Mr. Beamer paid 95 for some of his bonds, and one parcel he bought as low as 85. Mr. Fulton, I think, bought the controlling bonds at about that—75.

Q. I don't want to take up time going through the letters.

A. That is the best of my remembrance. I think there was bonds sold lower than those that were sold to Mr. Beamer, because Mr. Beamer bought the first bonds issued, and we were compel-ed to accept 75 I think for the last 126 bonds that we had. Possibly a shade less than that.

Q. Weren't there some bonds left over or hypothecated rather than sold to Fulton?

A. Not by the company.

219 Q. Any by A. C. Boyd & Co.?

A. That was by A. C. Boyd & Co.

Q. Don't you know that long after the receiver's sale Boyd sold some of his bonds?

A. I don't know what Mr. Boyd did. I had no control of him. I don't recall what amount of bonds that he had. I know he had some, but as to the firm of A. C. Boyd & Co., I believe it sold the last lot of bonds all in a lump, which was the controlling interest in the bonds.

Q. Did you know Jameson & Bros. of New York?

A. I know a Jameson in New York.

Q. Well, Jameson & Bros. any place?

A. I remember a firm of Jameson & Co., Philadelphia, that I believe we were negotiating with for the sale of bonds. They went down in price I think in 1891. That is a banking-house in Philadelphia.

Q. I wish you would look at this letter, marked Exhibit No. 72, and say whether it is in your handwriting; and then read the last paragraph you say it is.

A. This is my signature. Now shall I read the last paragraph?

Q. Yes. I now ask you whether or not Mr. Beamer at that date was not pecuniar-ly interested in the projected issue of bonds of the Penna. Plate Glass Company. Look at the date, November 18th, 1890.

A. Mr. Beamer had no interest in the issue of those bonds. A. C. Boyd & Co. had agreed to take them. I mean to say, he had no interest in the sale of them. I think as a director of the Penna. Plate Glass Co. he did aid us all in his power to dispose of the bonds.

Q. The point I want to get at is as to whether or not this refreshes your memory as to the date in which he had knowledge of the proposed issue of the bonds.

A. Mr. Beamer had knowledge of the proposed issue of the bonds at the date of the resolution authorizing the issue. As to what date that was I don't know.

220 Q. Look at the minutes of November 15th, 1890, and note that Mr. Beamer was appointed on the finance committee. Does that refresh your memory as to the date when Mr. Beamer first knew of the proposed issue of the bonds?

A. It don't speak of Mr. Beamer attending this meeting, does it?

Q. No; it only says he was appointed. At the next meeting he was present in person.

A. I don't know when Mr. Beamer first knew of the bonds, but upon his entrance into the company as director he must have known of it.

Q. Is it not true, Mr. Semmer, that before Mr. Beamer became a member of the board of directors, when you first approached him for his financial aid, as you described in your testimony the other day, he was informed by you that A. C. Boyd & Co. proposed to build these works, the terms upon which they were built, the proposed purchase, or the contract existing between A. C. Boyd and the company, and the proposed issue of bonds in accordance with your contract, in order to enable the company to carry out its contract, in order to enlist his financial aid which you were at that time seeking?

A. The plant was under construction several months before we ever spoke to Mr. Beamer, and the agreement had been entered into several months before Mr. Beamer's appearance in the company. That we were to receive the bonds—Mr. Beamer naturally upon entering the company must have been made aware that we were to receive pay according to our contract,—bonds and stock and cash.

Q. You recollect of stating that you had visited him before he came into the company?

A. Yes; I visited him in New York.

Q. At some of your visits to him in New York before he became a director, did you explain to him this matter of which I have inquired,—the *modus operandi?*

A. I am not positive what I did explain to him, but it is reasonable to suppose that I told him that we were to receive pay
221 for the plant in shape of bonds, stock and a certain amount of cash. I don't recall positively as to what kind of a statement I did make to him.

Q. It is only the substance I want, Mr. Semmer. I don't expect you would at this distance of time; but what else could you have talked to a man about whose financial aid you wanted?

(Objected to by counsel for plaintiff as being a conclusion and an argument.)

Q. Is there any doubt in your mind?

(Objected to by counsel for plaintiff as leading.)

A. I have a great deal of doubt what I told him. I made the best story I could of it.

Q. The substance of what you told him?

A. I can't recall, Mr. Schoyer.

Q. How long after the formation of the company on August 1st, 1890, before the plant was completed and in full running order?

A. Just about one year after that, I think.

Q. When were the works finally completed under your contract?

A. They were in operation in August, and I believe there were some small matters that required several more months to complete the entire contract. I am quite sure——(interrupted).

Q. Don't you know it was not fully completed until some time in 1892?

A. It might have been the last of the year or the first of the following year. It is barely possible.

Q. Do you recall anything about defects in construction?

A. No, nothing serious. At different times we had some small wrangles with the directors. They claimed certain appliances that we were to furnish to complete the plant, especially on the electrical lighting of the plant. No provision had been made for that, though after wrangling two or three months with the company we finally put the plant in, and it was somewhat the cause of the delay in turning the plant over, the electric lighting plant.

222 Q. Where did the bonds go to, into whose possession, after they were issued in January, 1891, A. C. Boyd & Co.'s?

A. Not all at one time. A. C. Boyd & Co. received them according to estimates made for work completed; they received them in $25 and $50 lots.

Q. What I want to get at is a different thing. Into whose custody or possession did the bonds go after they had been registered or certified by the Farmers' Loan and Trust Company?

A. They went into the hands of the treasurer of the Penna. Plate Glass Company.

Q. That was who?

A. George Cowan, I believe, was treasurer at the time.

Q. The same George Cowan who was interested in your share of the profits of A. C. Boyd & Co.?

A. Yes, sir.

Q. Do you recall anything about a change in the balance-sheet of the company in 1893—December, 1893—and returned to the treasury of stock in order to overcome a deficit of one hundred and nineteen odd thousand dollars?

A. Yes, sir; I recall that the company, under its various managements up to that time had lost one hundred and nineteen thousand dollars, and the proposition was made to elect me as president of the company and I wouldn't accept the position until this loss was made good in some manner or other. The only way it could be made good, or was made good, was the proposition of, I think, Mr. Cowan, that A. C. Boyd & Co. should return one hundred and nineteen thousand dollars of stock which they received for construction to cover up this deficiency, which was done. There was one hundred and nineteen thousand dollars, to the best of my belief, of A. C. Boyd & Co.'s stock returned to the treasury.

Q. That was returned to you afterwards, to A. C. Boyd & Co.?

A. No, sir, I think the certificate book will show the transfers that were made at that time.

Q. And in that way the balance-sheet was made to show no indebtedness?

223 A. I am no accountant, Mr. Schoyer, but I understood that that was the way the deficiency was going to be made up, and I contributed my share of stock towards doing so.

Q. I call your attention to Exhibit No. 98, dated February 5th, 1892, to A. C. Boyd & Co., identified as being dictated by you, in which you say, among other things, "I note the remarks you make about our friend, Mr. Beamer, withholding difference in payments to equalize with 'A' prices. Of course, you will understand this will be no go." What did that mean? And in this connection I hand you, Mr. Semmer, the letter to which that refers, being dated February 3rd, 1892, folio 2, Defendants' Exhibit No. 10.

A. I recall the matter. It was a very trivial thing, I think, involving about $1.82. We sold Mr. Beamer's company some glass, which is the Lloyd Plate Glass Insurance Company of New York, and in making payments, Mr. Beamer felt that his company ought to be entitled to the lowest price, which was "A" price. At that time there were "A," "B" and "C" buyers; and if I recall rightly, it was a little matter of $1.82 that Mr. Beamer and the Lloyd Plate Glass

Insurance Company were entitled to. He thought they were entitled to buy as low as anybody were buying.

Q. Mr. Semmer, I have tried to examine you fairly. Have you made answers to my questions without any mental reservations?

A. I have given you answers in every instance to my best of knowledge on the subjects you inquired about.

(Counsel for defendant here offer in evidence all the exhibits that are marked, except Exhibit 101 and Exhibit 102, and also except the books 72, 73 and 74, and also Exhibit 41, Exhibit 40, and Exhibits 42, 43, 44 and 45, being letters written by Cowan.)

(Objected to by counsel for plaintiff as being incompetent and irrelevant generally, and especially so under the pleadings.)

224 Cross-examination by Mr. FERGUSON:

Q. You were interrogated as to a minute of the board of directors of the company held November 15th, 1890, with a view to refreshing your memory as to the time Mr. Beamer became familiar with the issuing of the bonds. I desire to ask you whether or not that minute discloses Mr. Beamer's presence at that meeting.

A. I stated that Mr. Beamer was not there.

Q. Now, Mr. Semmer, with reference to these letter-press books which you were shown and asked to identify as the letter-press books of Mr. Boyd, I call your attention to the fact that a number of these letters bear no written signature, or there is no impression of any written signature, and many of them are written on the typewriter, the signature being typewritten in some cases, and in some cases the signature being made with a stamp; and also in this other letter book I call your attention to the same thing; and, after calling your attention to that, Mr. Semmer, I'll ask you whether or not you personally took impressions in either of those two letter books, or were familiar with the taking of impressions in them?

A. I don't recall any impressions in there. Don't know whether I ever looked into them. I was in Irwin very little. I was in New York most of the time. I should say those were Mr. Boyd's private letter books. I know that I carried a set of my own in New York. Those appear to be Mr. Boyd's private books.

Q. Then you do not say that they are from any personal knowledge you have of the keeping of those books, or taking the impressions in them? Is that right?

A. When I say they appear to be Mr. Boyd's private letter books I do not say that from any personal knowledge I had as to the books themselves.

Q. Not beyond recognizing his signature?

A. No, sir.

225 Q. Now this partnership contract, Mr. Semmer, between you and Mr. Boyd, was that verbal or in writing?

A. It was in writing.

(Counsel for plaintiff object to so much of the witness' testimony as relates to the agreement between himself and Mr. Boyd for the reason that it now appears that this contract was in writing.)

Redirect examination by Mr. SCHOYER:

Q. Have you got that contract between you and Mr. Cowan?

A. Between Mr. Cowan and myself? No. My contract with Mr. Cowan was a personal, verbal contract. It was the Boyd contract he asked me about.

Q. Have you a copy of the A. C. Boyd contract—A. C. Boyd & Co.?

A. Yes, sir.

Q. Between you and A. C. Boyd?

A. I can't place it just at this moment, but I am quite sure I have a copy of it—in New York, or possibly in my office here.

Q. Will you produce it at some future time?

A. I will do so if necessary.

Q. It seems to be necessary under the objection. As to that contract, all I wanted to know was the fact that there was a partnership; but Mr. Ferguson seems to want to object on the ground that it is in writing and hasn't been produced. Now you will produce it? I'll let you know some time to suit your convenience when you come back.

—. ——.

Q. Mr. Semmer, is it not true that you directed Mr. Boyd to keep copies of every letter he wrote, and send to New York to you copies of the letters that he wrote, as well as copies of letters which he received?

A. It is quite likely that I naturally, being nine-elevenths owner of the concern, would want to know what was going on. I don't remember at any time giving special instructions, but it is reasonable to suppose——

Q. Mr. Semmer, is there the slightest doubt in your mind
226 that the two letter books are not the letter books of the business of A. C. Boyd & Co., kept by Mr. Boyd at Irwin?

A. One of them seems to be pertaining to A. C. Boyd & Co.'s business entirely; and the other I notice is principally letters signed by Boyd. I don't know whether they are both A. C. Boyd & Co.'s business. One appears to be signed A. C. Boyd & Co. In one I recognize Mr. Boyd's signature pertaining to other business. I would say that is Mr. Boyd's book of the business of A. C. Boyd & Co. so far as they purport to be by the letters themselves. I haven't run over them very carefully, and don't know the contents of the books. They seem to pertain to the business of A. C. Boyd & Co.

Hearing here adjourned to meet in New York on Thursday, December 16th, 1897, at 11 o'clock a. m., at room 905, Mutual Reserve building, 309 Broadway.

*Testimony Taken Before H. D. Gamble, Special Examiner, at Room* 905 *Mutual Reserve Building,* 309 *Broadway, New York, in Pursuance of Notice, on December* 16*th,* 1897.

Appearances.

S. Schoyer, Jr., Esq., for the Penn Plate Glass Company and W. L. Kann.

Messrs. Turner, McClure & Rolston (by Mr. Turner and Mr. Blanc) for the plaintiff.

*Testimony of John A. Norman.*

JOHN A. NORMAN, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. SCHOYER:

Q. Mr. Norman, where do you live?
A. No. 60 Sydney avenue, Mount Vernon.
Q. You are the father of A. Livingston Norman?
A. I am.

227 Q. I hand to you Defendants' Exhibit No. 7, H. D. Gamble, examiner, which is the original charter of the Pennsylvania Plate Glass Company, in which you are recited as a subscriber for ten shares of the capital stock of the Pennsylvania Plate Glass Company, and ask you whether or not you were a subscriber for shares of stock of the Pennsylvania Plate Glass Company?

Mr. TURNER: Is it understood that all this testimony is subject to the general objection of incompetency?

Mr. SCHOYER: Yes, I agree to that.

Mr. TURNER: This Exhibit No. 7 is not in the handwriting of the witness, and I do not think it is a proper memorandum from which to refresh his memory.

A. I was not a subscriber.
Q. Did you ever hold any shares in the company?
A. I did, I held one.
Q. Did you pay for that share?
A. I did not.
Q. From whom did you receive it?
A. I could not tell you; I do not recollect.
Q. To whom did you return it?
A. I never returned it; it is still in my possession.
Q. Were you ever a director of the Pennsylvania Plate Glass Company?
A. I think I was.
Q. How long did you remain as such director?
A. I cannot answer that; I don't recollect.
Q. Did you resign?
A. I did not.

Q. Do you recognize the minute book of the company?
A. No, I never saw it.
Q. Were you ever at any meeting of the board?
A. Never was.
Q. Sir?
A. I never attended a meeting.
Q. This minute book, being Exhibit No. 1, H. D. Gamble, examiner, in its record of the proceedings of the board of directors, regular meeting of the board of directors, held November 5th, 1890, on page 21, contains this clause: "Mr. A. L. Norman offers resignation of Mr. John A. Norman from the board of directors of this company. On motion said resignation was duly accepted." And
228 I ask you whether or not you authorized such resignation?
A. Well, really, I could not answer that question. I answer quite promptly about the resignation. I took absolutely no interest in it at all and never attended any meetings, and I knew absolutely nothing about the transactions, only what I heard in a casual way now and then.

By Mr. TURNER:

Q. About what transaction?
A. About the whole thing. I never attended a meeting. I know nothing about it.

By Mr. SCHOYER:

Q. Mr. Norman, I would ask you what business you were engaged in at that time?
A. I was a custom-house broker.
Q. Not connected with plate-glass industries in any way?
A. In no way at all.
Q. And your memory does not enable you to recollect how you came to be interested in even one share of the Pennsylvania Plate Glass Company?
A. No, I don't recollect.

Cross-examination by Mr. TURNER:

Q. Where do you live, Mr. Norman?
A. No. 60 Sydney avenue, Mount Vernon.
Q. Mr. Norman, Mr. A. Livingston Norman is your son, is he not?
A. He is.
Q. Did he have any authority to use your name as a subscriber in this matter?
A. Well, I don't recollect; I took so little interest in the matter that I did not charge my memory with any of the actions—any of my acts.
Q. If your son should testify that he used your name and had authority to use it do you wish to be understood as denying that statement?

(Mr. SCHOYER: Objected — as an improper form of question and irrelevant, as the son has not so testified.)

A. Yes.

229 Q. Do you wish to be understood as testifying that you did not subscribe for this stock either personally or through any other person in any way authorized to make the subscription for you?

(Objected to for the same reason.)

A. I did not subscribe either myself or through any other person and never authorized any one.

Q. When was the fact, if it was a fact, that you appeared to have subscribed to some shares of this stock first called to your attention?

A. This is the first I have seen or heard of it.

Q. This present hearing?

—. This present time; when I saw my name on that paper it is the first I ever knew of it.

Q. You had never been told by anybody that you were appearing on the papers of this corporation as a subscriber to its stock, or in its books as one of its directors?

A. Not as one of the directors. I knew I was a director; but as to the stock I knew nothing about that.

Q. You spoke about having one share?

A. Yes.

Q. But you do not know who gave you that share?

A. I don't recollect, no.

Q. You knew you were a director, I understand you?

A. I knew I was a director, because I saw it published in a pamphlet, I believe.

Q. Did you ever attend any director meetings?

A. I did not.

Q. Ever fulfill any duty as a director, whatever?

A. Never did.

Q. Ever protest against being on the board of directors without your consent?

A. Never did.

Q. You knew that you were held out to the world as director?

A. I knew that I was—that is—yes, I knew it; yes, I knew that I was a director.

Q. And in spite of your knowledge to that effect you never took any duty upon yourself as a director in any way or shape?

A. Never did; never attended a meeting.

230 Q. Ever resign?

A. That I don't recollect; that I would not say.

Redirect examination by Mr. SCHOYER:

Q. Were you present at a meeting of the stockholders of the Pennsylvania Plate Glass Company to hold an election upon the approval or disapproval of the proposed issue of two hundred and

fifty thousand dollars' worth of bonds, which meeting was held on November 15, 1890, at Irwin, Pennsylvania?

A. I was not.

Q. Did you sign a waiver of notice, of the sixty-day notice of the holding of such meeting as a shareholder?

A. That I don't recollect.

Q. Had you notice that such meeting was held or was to be held?

A. They sent me notices of the meetings, but what they were I don't know. I couldn't say whether I got a notice of that meeting or not.

Recross-examination by Mr. TURNER:

Q. You do not really recollect anything about this company at all, do you?

A. I paid so little attention to it that I didn't charge my memory with it; I attended no meetings; I didn't know anything about the business, and all that I knew was hearsay.

Q. You did hear occasionally there was such a company?

A. I knew there was such a company in existence, and I used to receive notices of the meetings.

Q. And you knew your son was interested?

A. Yes.

Q. And you knew your son was a director?

A. I knew he was a director, yes. That is, I only knew from hearsay; I knew in a general way he was a director.

Q. The whole thing is some years ago?

A. Yes.

Q. Is your memory good?

A. Not as good as it used to be.

Q. You received notices of the meetings of the directors, I understand you to say?

A. Yes, I think I did.

231 Q. And you never sent them back and said you were not a director?

A. No.

It appearing that the witness is not a resident of New York city and that the power to examine is to take the testimony of witnesses in New York, Philadelphia, Harrisburg, any objection that Mr. Norman does not live in New York is waived.

*Testimony of A. Livingston Norman.*

A. LIVINGSTON NORMAN, a witness called in behalf of defendants, being duly sworn, testified as follows:

Direct examination by Mr. SCHOYER:

Q. Mr. Norman, you are a member of the bar of New York?

A. I am.

Q. And were so in 1890?

A. I was.
Q. And prior to that time?
A. And prior to that time.
Q. Do you know the Pennsylvania Plate Glass Company?
A. I do.
Q. And Philip Semmer?
A. I do.
Q. And George Cowan?
A. I do.
Q. James G. Beamer?
A. Yes, sir.
Q. And Mr. A. C. Boyd of Irwin, Pennsylvania?
A. Yes, sir.
Q. And Mr. C. W. Pool?
A. C. W. Pool.
Q. Of Irwin?
A. Yes, sir.
Q. Mr. F. Y. Clopfer?
A. Yes, sir.
Q. And Daniel Harrison?
A. Daniel Harrison.
Q. And Thomas McKie?
A. Thomas McKie.
Q. Wray E. Davis?
A. Mr. Wray E. Davis.
Q. Did you have a professional relation with the Pennsylvania Plate Glass Company in its formation?
A. I did.
Q. Through whom did you have such professional relations?
A. I think Mr. Semmer spoke to me about it first.
232 Q. Did he inform you of the existence of a firm known as A. C. Boyd & Company who were to construct a glass works at Irwin, Westmoreland county, Pennsylvania?
A. Yes.
Q. And then spoke to you about the formation of a company to take up the plant?
A. He did.
Q. When it was constructed?
A. Not that way.
Q. How was it then?
A. This, as you know, is seven years ago. My recollection is, however, that the company was formed and the contract was given to A. C. Boyd who built the works for the company, A. C. Boyd & Company.
Q. That is correct. I am speaking now of a point of time before you had actually prepared the papers for the company, or started the company. You knew the purposes for which the company was to be formed?
A. My recollection is that the formation of the company was the first thing done.
Q. You then did not know that A. C. Boyd & Company were the

projectors and the proposed constructors or contractors of the plant and the projectors of the formation of a company to purchase that plant?

A. My recollection is that the contract was given by the Pennsylvania Plate Glass Company to A. C. Boyd & Company to construct the works.

Q. I am speaking now of a point of time prior to the preparation of the papers.

A. That is a long time ago.

Q. Only to the best of your recollection now, sir.

A. I don't remember.

Q. I have some papers and letters here that I think may refresh your recollection.

A. I would like to see them.

Q. Do you recall advising Mr. Semmer that in the formation of the proposed company the contractors could not be promoters or officers?

A. That is good law if I so advised them.

Q. And you cannot recollect whether you so advised them or not?

A. I can't recall whether I advised them or not. If they asked me I should have advised them in that way.

233 Q. You drew the articles of association or charter, as it is called?

A. I think I did.

Q. I now hand to you Defendants' Exhibit No. 7, H. D. Gamble, being the original charter of the Penn Plate Glass Company, and ask you whether that paper is in your handwriting.

A. That paper is not in my handwriting; and what is more I do not know whose handwriting it is in.

Q. I only asked you whether it was in your handwriting. In this paper, sir, I see that you are a subscriber for ten shares of the capital stock.

A. Yes, sir.

Q. Is that a correct statement?

A. Yes, sir.

Q. Did you pay for that subscription?

A. I think I allowed that on my bill.

Q. You subsequently had ten additional shares, did you not, which was paid likewise on the bill?

A. I believe so; yes.

Q. And you paid nothing directly in cash to the company except by allowance for your professional services, I suppose?

A. No. I thought it was easier to allow it on the bill than to give my check and get a check back.

Q. You were also the secretary of this company, were you not?

A. For a short time, yes.

Q. And then you became one of the directors?

A. I believe I was a director from the start.

Q. I now hand you Defendants' Exhibit No. 1, H. D. Gamble, and ask you if that is the minute book of the Pennsylvania Plate

Glass Company, and whether where your name appears as secretary is in your handwriting.

A. That is my handwriting. Yes, that is the minute book of the Pennsylvania Plate Glass Company, so far as I know. That is my signature here at various places.

Q. Do you recall when you ceased to be secretary?

A. No, I do not. The book shows for itself.

Q. You were succeeded, were you not, by Mr. Redinger, as secretary?

A. Mr. Redinger was secretary. I think he succeeded me; I am not sure of that.

234 Q. Do you know whether or not Wray E. Davis was a *bona fide* subscriber for 3,738 shares?

A. I presume he was.

Q. I did not ask for your presumption.

A. I could not answer.

Q. You can say you do not know?

A. I do not know.

Q. Do you know, sir, whether or not Thomas McKie——

A. Same answer.

Q. You were not informed then by Mr. Semmer that Thomas McKie was his dummy to hold those shares?

A. I understood Mr. McKie was a very rich man doing business on Wall street.

Q. Mr. TURNER: I make a special objection to these questions.

Q. Do you know whether Mr. Harrison——

A. I never met Mr. Harrison until I met him in Pennsylvania, here in Irwin, and he was introduced to me as prosperous member of the bar, supposed to have plenty of money and was building a very elaborate house there, to my recollection today.

Q. Did you prepare the papers for the proceedings for the increase of the indebtedness by an issue of two hundred and fifty thousand dollars' worth of bonds for this company?

A. I did.

Q. The original of that is on file at Harrisburg and here is a certified copy. Will you kindly look at that and see if it aids you in recalling the contents of the paper?

A. No. This all happened seven years ago, and this being a certified copy I presume it is exact, an exact copy of the original on file at Harrisburg.

Q. Did you furnish the list of stockholders to the judges of that election?

A. I presume I did, but the paper speaks for itself and everything in that paper is correct.

Q. Who kept the stock ledger and the transfer books, did you as secretary?

A. I generally wrote them up; but I think that Mr. Cowan
235 kept this—kept the stock certificate book and stock ledger. I used to see Mr. Cowan several times a week and we would go over these matters.

Q. Did you make the entries or did Mr. Cowan make the entries on those books?

A. I think Mr. Cowan made the entries under my supervision. He might have made some without my being there, but I always went over the book and checked them up.

Q. And how would you be advised what transfers to make of the holdings of the stock from time to time? From whom did you get the information?

A. What transfers?

Q. When the stock changed hands.

A. The stock certificates or the stock ledger?

Q. Anything that would show the change of ownership of the stock from one person to another. How would he be advised as secretary, and from whom how to make your entries?

A. I can't remember. Different ways at different times.

Q. Tell some of the ways if you can.

A. Well, I can't remember that.

Q. Do you remember of having been ever advised, and is it not true that those entries were made under the direction of Mr. Cowan?

A. Well, as I say, Mr. Cowan kept the stock book, stock certificate book and the stock ledger, but I had free access to them.

Q. Do you not recollect, Mr. Norman, at a special meeting of the board of directors held at the office at Irwin, Pennsylvania, December 18th, 1890, that you were present, that you offered the following resolution:

"Whereas, Wray E. Davis and Daniel Harrison desire to be relieved from a part of their subscriptions to the capital stock of this company to the extent of 6,050 shares and 1,225 shares respectively, and

"Whereas in the opinion of the directors of this company the stock covered by the subscriptions from which relief is sought, as above, can be used for the beneficial interest of this company; now, therefore, be it

236 "Resolved, That Wray E. Davis be relieved from his subscription to the capital stock to the extent of 6,050 shares, and that Daniel Harrison be relieved from his subscription to the capital stock to the extent of 1,225 shares, and that said stock shall be returned to the treasurer of the company to be used for the best interest of the company, and that the same shall be used at such times and in such quantities as the financial needs of the company may require, and that the secretary be, and he is hereby authorized and instructed to notify said Davis and Harrison of the above action." Which appears to have been seconded by Mr. Clopfer, and carried unanimously.

Mr. TURNER: I object to that as leading, and, also, because counsel has read into the question from a minute book which may be excluded as testimony and is objected to.

Q. I then ask you to look at your signature on page 27 of that minute book and ask you whether that is in your handwriting, and in whose handwriting is the entire minute, if you know?

A. The minute is in the handwriting of the clerk who was formerly in my office.

Q. What is his name?

A. I don't remember his name or where he is.

Q. The signature.

A. The signature is my signature.

Q. Now, the question is, do you recall the making of such record?

A. I will answer that by saying that the resolution speaks for itself and I signed it; it must be so.

Q. What provision was made for the return of Wray E. Davis and Daniel Harrison of the money which they seem to have paid, from your evidence, as *bona fide* subscribers of stock?

A. I really do not know. I was not the treasurer of the company.

Q. How did it come, sir, that you introduced that resolution?

A. I could not tell you that.

Q. Can you recall at whose request or upon whose information you thought this was the proper policy?

A. I could not tell you that.

237 Q. And I now ask you, in the light of this resolution, whether or not Wray E. Davis was a *bona fide* subscriber for 6,050 shares and Daniel Harrison for 1,225 shares of stock of the Pennsylvania Plate Glass Company?

(Objected to as hearsay and incompetent.)

A. I think I have already answered that question.

Q. I am asking you now in the light of this resolution.

(Same objection.)

A. I make the same answer.

Q. Have you any explanation to make why you as the secretary of the company and as a member of the board of directors released *bona fide* subscribers to the amount of 7,275 shares for which subscribers were liable to the company?

A. There was some good reason for it at the time. But just what it was I do not know.

Q. You are unable, therefore, now to recall any reason?

A. I cannot recall any. I have drawn a good many thousand resolutions since that time.

Q. I hand to you Defendants' Exhibit No. 8, H. D. G., examiner, certified by the secretary of the Commonwealth of Pennsylvania as having been filed, being a correct copy of a paper filed in his office on the 15th day of December, 1890, purporting to be the certificate of the proceedings of stockholders of that company on the proposition to issue two hundred and fifty thousand dollars' worth of bonds, and ask you if you did not certify Wray E. Davis as the holder or subscriber of 7,052 shares and Daniel Harrison as the holder of 1,226 shares, and therefore, as competent voters at the election.

A. The report filed in the office of the secretary of state at Harrisburg speaks for itself and all statements contained therein were true.

Q. If that certificate correctly shows the date of filing as of December 15th, 1890, of the said certificate, a copy of which is
238 Defendants' Exhibit No. 8, H. D. G., examiner, then three days after that election, to wit, at the meeting of December 18th, 1890, you moved for the release of the shares of Wray E. Davis and Daniel Harrison?

A. If the book says so I presume that I did.

Q. Do you recall what became of the stock that was released?

A. I do not.

Q. Did it go to the treasurer?

A. I don't know. The stock ledger would show that.

Q. You understand, sir, I am only trying to get the best of your recollection?

A. But this is seven years ago and I have been mixed up with companies' business of all kinds.

Q. Who prepared the contract between A. C. Boyd & Company and the Pennsylvania Plate Glass Company by which the company agreed to purchase from A. C. Boyd & Company the glass plant?

A. As I understand it no contract was drawn for that purpose.

Q. I now hand you Defendants' Exhibit No. 11, H. D. Gamble, examiner, and ask you to look at the signature, attest A. Livingston Norman, secretary, the signature and seal, and ask you if that is the signature.

A. That is my signature.

Q. Now look at the paper itself and see whether or not it is the contract between the company and A. C. Boyd & Company.

A. Yes, sir. I believe I drew that contract.

Q. For whom were you acting in drawing that paper, A. C. Boyd & Company or the——

A. The Pennsylvania Plate Glass Company.

Q. I call your attention, sir, to the minutes of August 30th, 1890, in Exhibit No. 1, H. D. Gamble, examiner, which appears to be the meeting for organization, and particular- to that part of those minutes on page 13, and resolutions purporting to be offered by you which in part are as follows, simply to give you the subject-matter:

"Whereas the firm of A. C. Boyd & Company are the
239 owners and holders of certain lands, contracts and franchises, to wit, twenty-one acres of land, more or less, at North Irwin, North Huntington township, Westmoreland county, and State of Pennsylvania, a contract with the Irwin Natural Gas Company, whereby said company covenants and agrees to furnish natural gas in sufficient quantities to operate a plate-glass plant having a capacity of three twenty-pot furnaces, with the necessary ovens and appurtenances for ten years from June 16th, 1890, and a contract with C. W. Pool, whereby said Pool covenants and agrees to furnish all water required to operate the plant above referred to; and certain improvements in grinding and annealing plate glass, and

"Whereas the said firm of A. C. Boyd & Company are now erecting a plate-glass plant on the twenty-one acres of land above set forth, having a capacity of three twenty-pot furnaces, with the an-

nealing ovens and appliances, incident and necessary to the output of 1,250,000 square feet of plate glass, more or less, and all rights to use certain improvements in grinding and annealing plate glass, and

"Whereas said land, contracts, franchises and plate-glass plant are necessary for the use of this company for the business for which it was incorporated and organized to carry on, and it desires to purchase the same for use in its said business, and

"Whereas, said firm of A. C. Boyd & Company are ready and willing to sell, assign and set over unto this company for and in consideration of eight hundred and fifty thousand dollars to be paid as hereinafter provided the land, contracts and franchises as above set forth, and to finish and complete ready for operation such plate-glass plant by the first day of July, 1891, and

"Whereas the directors of this company deem and consider such purchase price of eight hundred and fifty thousand dollars the fair and reasonable value thereof,

"Now, therefore, be it resolved, that this company purchase
240 from A. C. Boyd & Company said twenty-one acres of land, more or less, in North Irwin, North Huntington township, Westmoreland county, State of Pennsylvania; all interest in and benefit arising from the contracts with the Irwin Natural Gas Company and with C. W. Pool for water supply, and to purchase the plate-glass plant now being erected by the said firm of A. C. Boyd & Company at North Irwin, and to pay the same as follows: and the right to use certain improvements now controlled by A. C. Boyd & Company for grinding and annealing plate glass." Followed by the installments of cash and stock payments which will appear upon the minute book itself, and also on page 17, containing your name as secretary in attestation thereof, and ask you whether that is your signature?

A. It is.

Q. And whether you recall why it was or how it came to be that you offered these resolutions at the meeting for organization of this company?

A. That is my signature at the end.

Q. (Question repeated.)

A. I do not recall how it came about that I offered those resolutions at that meeting.

Q. In those resolutions you say that A. C. Boyd & Company were ready and willing to sell. Do you recall how you knew that?

A. I presume they had expressed their willingness.

Q. To whom? To you?

A. Possibly to me, yes. They were in Irwin at the time and we saw them constantly.

Q. Do you know, sir, that they had your written proposal?

A. I have no recollection of a written proposal.

Q. Now, sir, after looking at these resolutions, which, if you care to, you can read more carefully, is it not true that you did represent either Philip Semmer as a partner of A. C. Boyd & Company, or

A. C. Boyd & Company in this transaction with the Pennsylvania Plate Glass Company?

A. I had been doing business with Philip Semmer for two or three years, or two years at any rate before the organization of this company.

241 Q. Is it not true, Mr. Norman, that doing that business for Mr. Semmer, that he advised you of his plan of operations, what he wanted, and wanted your professional aid to keep him straight and draw papers in the proper way?

A. That is rather a hard question to answer. That is not a fair question.

Q. I am trying to make it fair, but if you think it is unfair I will try to frame it some other way.

A. Can I answer that my own way?

Q. I prefer a categorical answer, but make it your own way.

A. The fact of the matter was I was the attorney for the Pennsylvania Plate Glass Company and having done business with Mr. Semmer before, he was satisfied with my work and had no other attorney, and he talked with me about his matters.

Q. I hand to you Defendants' Exhibit No. 77, H. D. Gamble, being a letter of July 25th, 1890, addressed to A. C. Boyd & Company and signed by Philip Semmer, identified on the minutes as a letter written by him, and ask you if that will aid you in recalling the relation which you bore toward A. C. Boyd & Company.

Mr. TURNER: I object to this being shown to him to refresh his memory, because it does not appear that Mr. Norman had anything to do with it except his name is mentioned in it.

Q. Did you, or did you not, about that date advise Mr. Semmer that it would be necessary for A. C. Boyd & Company to submit a schedule of the completed work they proposed to sell and submit such a schedule at the first meeting?

A. I can't tell. I would like to continue that answer and state that my answer to your last question, I think, shows the relation which existed between Mr. Semmer and myself and explain why he came to me for these points of advice.

242 Q. I also call your attention to Defendants' Exhibit No. 33, H. D. Gamble, examiner, dated July 16th, 1890, being a letter addressed to A. C. Boyd & Company and signed by Philip Semmer, and identified as his signature by himself as a witness in this cause to the last clause of that letter.

Mr. TURNER: I object to the reading of that clause before the witness. I object to it because the question is leading and because the paper should not be put before the witness to refresh his memory or for anything else, as it is not binding upon him.

Q. (Continuing:) To the last clause of that paper in which Mr. Semmer says "that Mr. Norman decided that neither yourself, Mr. Cowan nor myself have our own interests; it will not be practical to mention our individual names, inasmuch as we are the contractors. We have a couple of dummies from New York to repre-

sent us and I presume you would have seen your Pittsburg party to represent your interest, both application for incorporation and director for the first year, upon which we have decided upon seven directors for the first year," and ask you, sir, whether or not you had given such advice to Mr. Semmer.

Mr. TURNER: I object to that question because the counsel has read into the minutes a portion of a letter which speaks for itself and which is subject to our objection in this case.

A. I may or may not have given Mr. Semmer this advice. I can't remember.

Q. If, sir, you did give him that advice did you do so as the attorney for Semmer or A. C. Boyd & Co.?

A. I do not want to answer that as a discussion of the ethical questions of the profession. I was the attorney for the Pennsylvania Plate Glass Company; I had already represented Mr. Semmer in some quite important matters and had been successful, so that he had confidence in me and stated that he would like to continue me as his personal attorney in connection with this enterprise, provided I could do so without prejudice to the interests of the Penn-
243 sylvania Plate Glass Company. This I agreed to do generally. There was no retainer. When questions came up he simply asked my advice on them.

Q. Then as attorney for the company you knew that A. C. Boyd & Company were to receive the stock, money and other payments mentioned in the minutes that I have referred you to?

A. I did.

Q. And advised these people that it would not be practicable for them to manifest their real interest because they were contractors?

A. I do not remember exactly just what I advised. In fact, I do not remember the question being presented to me, but the letter you read me is Mr. Semmer's interpretation of my advice, and you as a lawyer know that clients do not at all times get the advice, or, rather, receive the advice as given.

Mr. SCHOYER: The latter part of that answer, commencing "and you as a lawyer," is objected to as not responsive.

Q. You knew then at this time, did you not, that those interests of A. C. Boyd & Company and its members were represented by a couple of dummies from New York?

A. No, I did not. I don't know whether a man is a dummy or not. It is not my province to know.

Q. You received a salary as secretary, I suppose, of the Pennsylvania Plate Glass Company?

A. I did not.

Q. Did you as director?

A. I did not.

Q. Did you charge a salary?

A. I did not. I received a retainer of fifteen hundred dollars a year for acting as counsel after the work had been finished, after the building of the plant had been completed.

Q. Then if the books show that you were receiving a salary as secretary the books were wrong?

A. I never received a salary as secretary. I received a retainer for acting as counsel.

Q. Was there a resolution fixing your professional relation and salary as attorney?

A. I can't tell you. I presume so.

244 Q. You have no recollection?

A. I have no recollection. I know I received the money.

Q. As secretary of this company you procured, did you not, the registration of the bonds by the Farmers' Loan & Trust Company?

A. I think not.

Q. And you received into your possession the bonds when they were so registered and receipted for them did you not?

A. My receipt would show that.

Q. What did you do with those bonds when you got them?

A. I couldn't tell you. I don't know.

Q. Did you give them to Mr. Cowan?

A. I don't know.

Q. I ask you whether or not you got the bonds and what you did with them.

A. I got the bonds.

Q. To whom did you give the bonds?

A. I do not know, but I think that I gave them to the treasurer of the company.

Q. George Cowan?

A. George Cowan.

Q. Did you at any time see an estimate of the proposed cost to A. C. Boyd & Company of the plant which they agreed to sell to the Pennsylvania Plate Glass Company?

A. Not to my recollection.

Q. As a director of the company did you ever make any effort to ascertain the real cost of that construction before offering resolutions to enter into a contract for eight hundred and fifty thousand dollars with that company?

A. I did not.

Q. How did you satisfy your mind, sir, that the eight hundred and fifty thousand dollars to be paid to them under your resolutions, subsequently consummated by a contract drawn by you, was a fair price for the proposed works?

A. To the best of my recollection the proposed contract was talked over in the directors' meeting, and I believe that the directors present represented nearly all of the stock of the company and that they were satisfied with the price.

245 Q. Do you recall the directors who were present and satisfied?

A. I do not.

Q. Was Mr. Pool present?

A. The minutes will speak for themselves. There were present at that meeting Mr. Pool, Mr. McKie, Mr. Davis, Mr. Clopfer, Mr. Harrison and myself.

Q. And you say those gentlemen were satisfied with the price in the discussion?

A. The minutes, I believe, show that the resolution was carried unanimously.

Q. What statistics or statements of evidence were presented to you and to the members of the board at that meeting of the real cost of constructing and the fairness of the offer of eight hundred and fifty thousand dollars?

A. I do not remember.

Q. Was there any?

A. Oh, I remember a long discussion. I remember among other things that the value of the gas franchise was discussed, and that was considered very valuable.

Q. Do you recollect the value that was upon that?

A. I do not.

Q. Anything about water?

A. The water was taken up. All of these different things were taken up and discussed, and I think that we were paying, or to pay, a nominal sum or possibly nothing, I don't remember which, for the gas, and if we were to buy coal it would cost thirty or forty dollars a year. This is very hazy in my mind, but I remember the different pieces of property, and rights, franchises, &c., contracts that were turned over to the company were all taken up and discussed.

Q. Was there any discussion as to the cost of the different buildings and machinery?

A. I don't remember, I remember a long discussion.

Q. The apparent subscription of ten shares of your father was released to the extent of nine shares, was it not, on the books?

A. The books will show that.

Q. I am asking you, sir.

246 Mr. TURNER: We object to that.

A. My father testified that he had one share and I presume that the other nine shares—but it is merely a presumption—were released.

Q. What do you know about the allegation in the articles of association that ten per cent. of a million dollars, being one hundred thousand dollars had been paid in in cash to the treasurer, Mr. George Cowan? Do you know whether it was or not?

A. I told them that it must be and I presume it was. That was done, I believe, in Pennsylvania. I was not present at the meeting where that was done.

Q. You have no other knowledge than what you have just stated on that subject?

A. I told them that they would have to pay it.

Q. And you were then told——

A. That it had been done.

Q. And you were so told by whom?

A. I couldn't tell. I think I saw the original articles of association, articles of agreement, or whatever it was called, with the affi-

davit attached; that satisfied me. I do not think I asked any further questions.

Q. I ask you if you have any other information outside of the records?

A. No, I think not.

Q. You were not then consulted about the mode of complying with the laws of Pennsylvania?

A. That was done at a meeting in Pennsylvania at which I was not present; that is the best of my recollection.

Q. At the time you offered the resolution to go into a contract relation with A. C. Boyd & Company for eight hundred and fifty thousand dollars, the works were yet to be constructed, were they not?

A. I think they had been started, but they were not completed. I do not know. Just change that answer.

Q. When were they completed?

A. Within a short time, a few months after that contract was entered into.

247 Q. As the professional adviser of the company and as a director of the company, did you take or secure from A. C. Boyd & Company any guarantee or bond that they would comply with that contract?

A. I don't think any bond was given.

Q. Do you not know, sir, that the terms of payment provided for by the contract were anticipated by the board from time to time?

A. The minutes would show.

Q. I am aware of that.

A. I don't remember.

Q. You know Mr. Beamer, you say?

A. I know Mr. Beamer.

Q. He was at one time a director and vice-president of the company, was he not?

A. Yes, sir.

Q. Do you know when he came into the company?

A. No; I do not remember.

Q. But it was before the bond issue, was it not?

A. I cannot tell you. The minute book will show that.

Q. You have no connection now with the company?

A. I have no connection now with the company.

Cross-examination by Mr. BLANC:

Q. You have been asked several questions with regard to releasing certain of the original subscribers to this stock. Can you remember anything at all with relation to your connection with these releases? It seems you made one of the resolutions at that time. I would like you to state as far as you can exactly what you remember with regard to that transaction, the object of the resolution and the reason for it and what subsequently became of that stock, if you have any recollection at all.

A. I think the books of the company would show just exactly how that came to be released and what was done with the stock.

Q. The minutes?

A. The minutes and the stock ledger, and that is so much better evidence than my recollection that I would rather have you get the best evidence you can.

248 Q. The books may not show the reason why. Have you any recollection?

A. You see it is seven years ago and I am really very hazy.

Q. And you really have no recollection at all?

A. No, sir.

Q. But you have no doubt they were entirely regular?

A. I have no doubt they were entirely regular, and that all the proceedings of the company were entirely regular.

Q. As a lawyer you have had connection with other companies?

A. I have had connection with a great many companies.

Q. And the organization of companies?

A. And the organization of companies, and the issue of bonds.

Q. And you are not aware of anything being done in this company not in accordance with the strict rules of law relating to the organization of a company, as a lawyer?

A. I am quite sure that all of the statutes of the State of Pennsylvania were complied with, and that the legal matters of the company are all straight and regular.

Q. You were asked several questions with regard to your relations with Mr. Semmer. Are we to understand that you were not his attorney under a retainer at the time you were acting as attorney for this company? You have stated that you were not acting under a retainer from Mr. Semmer.

A. Mr. Semmer never paid me a retainer at any time, and I have done some very important work for him and I have been paid for it.

Q. But you were paid as attorney by this company?

A. I was paid as attorney by this company.

Q. And you acted in all these transactions as attorney for the company?

A. Yes, sir.

Q. And not as attorney for Mr. Semmer except as you did give him friendly advice from time to time?

A. I gave Mr. Semmer friendly advice and attended to certain matters not affecting the company in any way for Mr. Semmer in this connection and was paid for it.

249 Q. In all transactions in which Mr. Semmer or his firm were connected with this company you were acting exclusively as attorney for the company?

A. No; I can't say that I was. I was acting for the Pennsylvania Plate Glass Company and I also acted for Mr. Semmer as far as I could without prejudice to the Pennsylvania Plate Glass Company.

Q. Mr. Semmer knew you were the attorney for the plate glass company?

A. Mr. Semmer knew I was attorney for the plate glass company.

Q. And he never paid you for anything as his attorney?

A. He paid me for work I did.

Q. But in this connection?

A. In this connection, in connection with the plate glass company.

Q. He did not?

A. No; in connection with the various little matters that came up in connection with A. C. Boyd & Co., one or two differences with people in Pittsburg.

Q. But not in connection with the plate glass company?

A. I think I can say no to that. It is hard work to separate it when they were the contractors and building for the Pennsylvania Plate Glass Company.

Q. During your connection as attorney for this company do you remember any instances where there arose any question between Mr. Semmer's firm and the plate glass company or any antagonism which required two different attorneys to represent them?

A. No; nothing but what was settled by the board of directors.

Q. This contract which was entered into by the plate glass company with Semmer's firm was submitted to the board of directors?

A. And discussed.

Q. And examined by them?

A. Very carefully.

Q. And by the proper officers of the company?

A. Very carefully.

Q. You were not the president or vice-president of this company at any time?

A. I was not.

250 Q. It was not part of your duty to examine specially into the contract, was it, or to learn the details of it, except as a member of the board of directors?

A. It was not, except that I drew the contract.

Q. Except that you drew the contract as attorney?

A. As attorney.

Q. You represented your father did you not, generally, in much of his dealings with this company?

A. Yes.

Q. Do you know yourself that he subscribed to ten shares of stock? You as director of this company would know that. Do you know?

(Objected to as entirely immaterial.)

A. I think that there must have been some conversation relative to this subscription.

By Mr. SCHOYER: I object to the answer.

By the WITNESS: But this conversation was not a formal one, and it is more than probable that Mr. John A. Norman has forgotten all about it.

Q. Do you know whether Mr. Beamer was one of the original incorporators of this company?

A. He was not.

Q. Do you know when he first subscribed for any of the stock?

A. Some months after the incorporation. The books will show that.

At 1.15 p. m. a recess was taken until 2.15 p. m.

*Testimony of Patrick Pendegrast.*

PATRICK PENDEGRAST, called as a witness on behalf of the defendant, being duly sworn and examined, testified as follows:

By Mr. SCHOYER:

Q. Where do you live?
A. 145 West 81st street.
Q. And how long have you lived there?
A. I have been in New York city for the last thirty years altogether.
Q. And you now live in New York city?
A. Yes, sir; I live there the last twelve years.

251 By Mr. BLANC: We won't raise any question about the residence of the witness.

Q. Do you know Mr. Philip Semmer, who was connected with the Pennsylvania Plate Glass Co.?
A. Yes, sir.
Q. In 1890, 1891, and 1892?
A. Yes, sir; 1890, 1891 and 1892, I knew him; he was my neighbor.
Q. Where was he then living?
A. He lived just about where I am now; I built on the house when he moved away; he lived next door to me, that was about 149; then there was a little cottage there.
Q. You knew him quite well, I suppose?
A. Oh, yes; as a neighbor; in and out there frequently.
Q. Did he ever talk to you about the Pennsylvania Plate Glass Company?
A. Yes, sir; many a time.
Q. Well, in order to cut the matter short, it appears on the records of the Pennsylvania Plate Glass Company you were the holder of stock in that company; were you such a holder for any period of time?
A. I don't know for what period; but I signed some certificates one night for him.
Q. Just state in your own way that entire transaction, how you happened to get this stock, and how long you held it, and what were the circumstances connected with it?
A. Mr. Semmer called on me one evening and stated that it was coming on election for the company and that he wanted to get president of it, he wanted to get elected president.

By Mr. BLANC: I object to this as being absolutely incompetent and immaterial and on the ground that it calls for hearsay evidence.

Q. Now, proceed.
A. Well, he said that there were certain stock that belonged to him that was in the hands of Mr. Cowen, the book-keeper.

Q. Mr. George Cowen?

A. Yes, sir; and that he was afraid that when it came to election that this man would turn over his stock—as he was afraid Cowen would run against him as president, and he asked me if I
252 would take these stocks in my name until after the election, and I said certainly, so he brought up the certificates, whatever they were, I never read them, and the girl that was there, I believe her name was Augusta, she signed underneath as witness, and then I couldn't remember just when, but in the near future, probably a month, or maybe three, he asked me then if I would just sign a release when he brought the paper to me.

Q. That is turning the stock back to him?

A. Yes, sir; I don't know what he did; that is all I know about it.

Q. You were not then a subscriber or purchaser of the stock?

A. No, sir.

Q. And you paid no money for it?

A. No, sir.

Q. And you returned it to Mr. Semmer without any compensation?

A. He had it all the time, but simply in my name; I never owned it at all; I just signed my name, and he spoke to me and wanted it back, wanted me to release it, and I signed my name again.

Q. You sent a proxy to vote for you?

A. No; never was asked; I don't believe I was ever asked, but that I couldn't now say on my word, whether I did or not; I don't believe I was ever asked as near as I can judge.

By Mr. BLANC: Now, I make a motion to strike out all that testimony on the ground that it is incompetent and irrelevant and immaterial, and that it is not receivable on behalf of defendants who offer it, because they are estopped from raising this defence.

Cross-examination by Mr. BLANC:

Q. When exactly did this transfer to yourself of the stock take place?

A. I couldn't tell you.

Q. In what year?

A. It may be about 1892, or probably 1893, as near as my recollection goes.

Q. You think it was in 1892 or 1893?

A. I think so.

Q. Prior to that time you had no stock in that company?

A. Never had.

Q. Nor interest in any way?

A. No.

253 Q. Do you remember how many shares of stock were transferred to you?

A. I couldn't tell you.

Q. You took no interest in the matter?

A. No.

Q. Was it one hundred shares or one share?
A. I couldn't tell you.
Q. Haven't the remotest idea?
A. Not a bit, because I wasn't interested in it.
Q. Now you say you signed something; what did you sign?
A. It was stock, there were three or four papers, probably more I signed.
Q. What was it?
A. They were in the shape of stock or bonds.
Q. Did you read them?
A. No, I didn't.
Q. How do you know they were stock of the Pennsylvania Plate Glass Company?
A. That is what he said.
Q. You only know it from what he told you.
A. Yes, sir.
Q. You had no personal knowledge on the subject.
A. No.
Q. You didn't read the papers?
A. No.
Q. Are you in the habit of signing papers that you don't read?
A. It was only a neighborly turn.
Q. You depended entirely on what knowledge you got from Mr. Semmer?
A. Yes, sir.
Q. So that you cannot swear those were certificates of the Pennsylvania Plate Glass Company?
A. No, I could not.
Q. Do you know that you have sworn just now that they were. Do you know that you are on your oath?
A. Certainly.
Q. And that everything you state at this hearing you are stating under oath?
A. Yes, sir, to the best of my belief and knowledge of what happened.
Q. You don't know what papers it was that this girl that you speak of witnessed, do you?
A. No, sir.
Q. Simply the papers that you signed?
254 A. Simply that I signed them and he called her as a witness, and she signed her name after me.

Redirect examination by Mr. SCHOYER:

Q. You never signed any other papers that related to the Pennsylvania — Glass Company's stock for Mr. Semmer?

By Mr. BLANC: Objected to on the ground that the witness has already stated that he didn't know what he signed.

A. No, sir.
Q. I now call your attention to a certificate, No. 25, of the Pennsylvania Plate Glass Company, and hereby identified as Defendants'

New York Exhibit A, H. D. Gamble, special examiner, and being annexed to Defendants' Exhibit 32, H. D. Gamble, examiner, purporting to be a certificate of stock of the Pennsylvania — Glass Company.

By Mr. BLANC: I object to the counsel's stating what it purports to be; it will speak for itself.

Q. (Question continued.) And ask you whether or not this was similar to the paper which you signed at the request of Mr. Phillip Semmer?

By Mr. BLANC: Objected to as incompetent and immaterial and because it calls the attention of the witness to a paper which has not been proved to be a certificate of the Pennsylvania Plate Glass Company.

A. Yes, sir, that is about the same nature of the paper as they were.

Recross-examination by Mr. BLANC:

Q. You say that this is about the nature of the paper that you signed?
A. Yes, sir.
Q. That is from the best of your recollection?
A. From the best of my recollection.
Q. You didn't read the certificate you signed?
A. No.
Q. But this looks like that one?
A. Yes, sir.
255 Q. It may have had a different picture on it so far as you actually know?
A. Yes, sir.
Q. Where did you sign that certificate?
A. In Mr. Semmer's house.
Q. I mean on what part of the certificate did you sign it?
A. I couldn't say, somewhere here in the lower part of it.
Q. Just show me where you signed it; did you sign it on the front of it or on the back of it?
A. On the front of it.

By M. SCHOYER:

Q. What you did sign was in relation to stock of the Pennsylvania Plate Glass Company, I understand you to say?
A. That is what I understood him to say.
Q. From Mr. Semmer?
A. From Mr. Semmer's information to me.
Q. And you had no other connection with any other paper of Mr. Semmer's excepting in that way?
A. Never.

*Testimony of George Cowen.*

GEORGE COWEN, called as a witness on behalf of the defendants, being duly sworn, and examined, testified as follows:

Direct examination by Mr. SCHOYER:

Q. You reside in New York?
A. Yes, sir.
Q. And you did so in the year 1890?
A. Yes, sir.
Q. You are the same Mr. Cowen who was treasurer of the Pennsylvania Plate Glass Company?
A. Yes, sir.
Q. And that was located where?
A. At Irwin.
Q. North Irwin, Westmoreland county, Pennsylvania?
A. Yes, sir.
Q. You know the firm of A. C. Boyd & Co.?
A. Yes, sir.
Q. Who composed that firm?
A. A. C. Boyd and Philip Semmer.
256 Q. And their business, their partnership business was what?
A. Building a plate-glass plant.
Q. Which subsequently was the plant of the Pennsylvania Plate Glass Company?
A. Yes, sir.
Q. What connection did you have with A. C. Boyd & Co. or Philip Semmer as a partner of A. C. Boyd & Co.?
A. My connection or interest was to pay out their money. When they sent me a voucher signed by both of them I drew a check for the amount. In other words they sent me the vouchers signed by A. C. Boyd and Philip Semmer, and I paid the checks to whomever the voucher was drawn.
Q. And you had no interest in Philip Semmer, in his interest in that firm?
A. No, sir.
Q. Then when he has so stated under oath that you had a half interest in his profit or share, which was nine-elevenths, he didn't tell the truth?
A. No, sir.
Q. You had no interest whatever?
A. No, sir.
Q. When did you first become connected with the Pennsylvania Plate Glass Company, was it after its organization, or before?
A. I guess at the time of its organization.
Q. You say your relation with A. C. Boyd & Co. was to cash vouchers which were sent to you by them?
A. As trustee, to make out checks as vouchers were presented to me.

Q. Of A. C. Boyd & Co.?
A. Of A. C. Boyd & Co.
Q. What were the vouchers for?
A. For work done at North Irwin.
Q. I know, but was it for the goods and expenses of building the plant, the business of A. C. Boyd?
A. The business of A. C. Boyd.
Q. And how did you come to be appointed trustee of A. C. Boyd & Co.?
A. I guess they had confidence in my honesty.
Q. They deposited the money with you?
257 A. They gave me money and I deposited it in the bank to the credit of A. C. Boyd & Co.
Q. And they sent their vouchers to you to be paid?
A. They sent the vouchers signed by A. C. Boyd and Philip Semmer, and I paid them.
Q. Where are those vouchers?
A. I imagined I must have turned them in to verify my account.
Q. You settled your account as such trustee with A. C. Boyd & Co.
A. Yes, sir.
Q. Do you recollect when you settled that account?
A. I think after the plant was completed.
Q. Then you had no money interest in A. C. Boyd & Co. whatever?
A. No, sir.
Q. You raised money for them, did you not?
A. I loaned them money.
Q. At what compensation?
A. Why I bought some stock from Philip Semmer or from A. C. Boyd & Co., but you may say my dealings were with Philip Semmer, because I was in New York most all the time. I am in the window-glass business, and did not know anything about building a plate-glass plant.
Q. In buying that stock from A. C. Boyd & Co., how did you pay for it?
A. The money I advanced them, loaned them, but whether that was A. C. Boyd & Company's stock or Philip Semmer's stock I don't know, but it was stock that was delivered to A. C. Boyd & Co.
Q. By whom?
A. By the Pennsylvania Plate Glass Co.
Q. Did your trust extend also to negotiating the bonds or any part of them?
A. No, I had nothing to do with that, that is so far as they were concerned.
Q. What arrangement was there between you and Philip Semmer, if any, as individuals?
A. No arrangement.
Q. Any partnership?
A. We talked of an arrangement, but it fell through.

258 Q. You were one of the promotors of the Pennsylvania Co.'s, weren't you?

A. No, sir; I didn't know anything about plate glass, and I don't know anything about promoting the industry.

Q. You were one of the charter members, were you not?

A. No, sir, I don't believe I was, that is something foreign to me.

Q. Your attention is now called to "Defendants' Exhibit No. 7, H. D. Gamble, examiner," being the charter of the Pennsylvania Plate Glass Company, and your attention is directed to the fact that you, the treasurer,—it is alleged therein that you were the treasurer of that corporation?

A. Yes, sir.

Q. There is an allegation also in this paper that the amount of the capital stock of said corporation was one million of dollars, divided into ten thousand shares of the par value of one hundred dollars, and that one hundred thousand dollars, being ten per centum of the capital stock had been paid in cash to the treasurer of said corporation, whose name and residence are George Cowen, New York city, State of New York. Was one hundred thousand dollars in cash, being ten per centum of the capital stock paid you?

A. In checks, yes, sir.

Q. I ask you in cash?

A. No, sir.

Q. Whose checks?

A. I don't remember.

Q. You are sure you don't remember?

A. Positive, yes, sir. I know there was one hundred thousand dollars paid in and deposited in the bank.

Q. And you now, being under oath, fail to remember so important a transaction as whose checks they were?

A. Yes, sir, positively, I don't remember whose checks they were.

Q. How many checks were there?

A. I don't remember.

Q. More than one?

A. I cannot remember, but I think there was.

259 Q. Did you have those checks cashed?

A. No, sir, they were deposited.

Q. Where and by whom?

A. I don't know. You see you didn't give me notice time enough to look those things up, or I would have looked them up; I was only notified last night, and I cannot remember in what bank it was deposited.

Q. I hand you a bank book of the Farmers' & Miners' Deposit Bank of Irwin, and now marked "New York Defendants' Exhibit B, H. D. Gamble, special examiner," and ask you whether the checks you refer to were deposited in that bank and included in the first entry?

A. I am not positive; I think it was though; I cannot tell whether I deposited it to the Pennsylvania Plate Glass Company or A. C. Boyd & Co.

Q. I am asking you as treasurer, you know?

A. I cannot answer that positively.

Q. But you know, don't you, that you made a deposit of the checks?

A. I made a deposit of the checks, yes, sir.

Q. Do you know whether those checks were paid?

A. No, but I know I drew against those checks.

Q. I am not asking you that?

A. I never received notice of protest or anything of that kind.

Q. Who handed you these checks?

A. I cannot tell you that.

Q. Or what individuals drew them?

A. I cannot remember that.

Q. I now hand you a check marked "Defendants' New York Exhibit C, H. D. Gamble, special examiner,"——

By Mr. BLANC: We will object to the admission of that check unless you can prove it by the witness.

Q. (Question continued.) Dated Irwin, Pennsylvania, August 30, 1891, No. 1, paid to the order of A. C. Boyd & Co. $100,000, Pennsylvania Plate Glass Company, George Cowen, treasurer, and ask you if that is in your handwriting?

A. Yes, sir.

260 Q. Was that the check that drew out this deposit, the ten per cent. deposit (handing witness bank book and check)?

A. Yes, sir; that was against that deposit.

Q. I now hand you "New York Defendants' Exhibit D, H. D. Gamble, special examiner," and ask you whether that is in your handwriting (handing witness paper), being the treasurer's report?

A. Yes, sir; that is in my handwriting.

Q. That is signed by you, is it not?

A. Yes, sir.

Q. Now, I call your attention to the entry of July 22, 1890, of receipts to the amount from Wray E. Davis $100,000 and again ask you from whom you received the $100,000?

A. From Wray E. Davis, very apparently.

Q. Now, who did you receive the checks from?

A. I don't know; I cannot remember; I cannot remember whether it was one check or several checks.

Q. And this is dated February 5, 1891, this last exhibit, Exhibit D, and your memory would be quite fresh, would it not, at that time?

A. Why, yes, it would be fresh at that time.

Q. And having now looked at your own report, as of the date of February 5, 1891, I ask you again from whom you received that $100,000?

A. Today I cannot remember whether I took that account from the books of the company,—I do not remember how that was; I cannot remember whether they simply sent me the check to sign here or not.

Q. I now call your attention to the charter, for the purpose of showing the date of its incorporation, being the 1st of August, 1890,

and that being entered July 22, 1890, before this company was organized, and again ask you from whom you did receive that money, if you ever did?

A. I do not remember. I know it was more than one check—it was more than one check, and I don't remember where I deposited it.

261 Q. Except from the books?

A. I don't know whether that is the check or not.

Q. Look at this exhibit (New York Defendants' Exhibit B), and state whether that is not your account.

A. As treasurer, yes; that is my account as treasurer.

Q. Who is Wray E. Davis?

A. Wray E. Davis is a friend of mine; I don't know where he is now.

Q. Where was he then?

A. He was in 1891——

Q. In 1890?

A. I cannot answer that now.

Q. Wasn't he a clerk of yours?

A. No, sir; I don't know; I don't know whether he was in 1890.

Q. At the time of this transaction?

A. I don't know whether he was; I can look that up and let you know.

Adjourned to Friday, December 17, 1897, at 11 o'clock.

NEW YORK, *December* 17, 1897.

Met pursuant to adjournment.
(Same appearances.)

GEORGE COWEN, direct examination, continued.

By Mr. SCHOYER:

Q. Since the adjournment have you prepared yourself to answer the last question, as to whether Mr. Davis was in your employ at that time?

A. Yes, sir; he was in my employ in 1890 and 1891.

Q. Had he been in your employ before 1890?

A. I didn't look that up; I asked my book-keeper and he told me he was with me in 1890 and 1891.

Q. Was he with you after 1891?

A. Yes, sir, he was with me in 1891 and 1892; I think he left us in 1892, but I won't be positive about that, but 1890 and 1891 he was with us.

Q. Do you know where he lives now?

A. No, sir.

Q. What is his business?

A. I don't know what he is doing now, but he was with a glass-house after he left us, and I don't know whether he is there now or not.

262 Q. What glass-house?

A. H. W. Foote & Co.; I am not sure about the initials but it was Foote & Co.

Q. Was he a man of means at the time he was in your employ?

A. I don't know; I don't think he was a very wealthy man; I think his wife was well-to-do.

Q. He is on the stock book or the charter of this company as a subscriber for 3,887 shares of the capital stock of the Pennsylvania Plate Glass Company, which would amount to $388,700, and subsequently seemed to be possessed of several thousand more shares, and was finally released from six thousand and fifty shares, and still retained in his name a thousand shares. Do you think he was a *bona fide* subscriber for the stock?

By Mr. BLANC: I object to the form of the question as being leading, and as stating facts which are assumed by the counsel and which are not proved in the case, and, furthermore I object to the asking of the treasurer of this company to deny—to the putting of a question with the object of having him disprove the records of the company of which he is the treasurer, on the ground that he as such treasurer is estopped from making such a denial.

Q. I add to the question, or that at that time, in 1890, he was pecuniarily able to be the owner of such stock, such amounts of stock?

By Mr. BLANC: Objected to on the ground that it calls for absolutely incompetent evidence, and for the reasons above stated.

A. I do not know.

Q. Well you wish that recorded that way?

A. Yes, sir, I could not tell you.

Q. You know enough do you not to know that you wouldn't have advanced him money on his paper for that amount without security?

A. Not personally.

Q. Yes.

A. I don't think I would.

Q. Why not?

A. Why, I could use my money for other purposes.

263 Q. And not because you wouldn't deem him pecuniarily able to meet such a loan?

(Objected to as immaterial.)

A. No, I don't think I would advance him that much.

Q. Why would you not have advanced him that much?

A. Too much money to give one man.

Q. And not because——

A. I wouldn't go into the details at all, but I wouldn't give a man that much money in New York unless he was a good deal richer man than Davis is; he would have to be a pretty wealthy man.

Q. Coming back to the relation which you bore to the company,

and to Semmer, and to A. C. Boyd, have you refreshed your memory about those transactions and connections?

A. I have thought a good deal of it, but I don't know how much I have gained by it; I have no records or anything to refresh my memory; I have to trust entirely to my memory.

Q. And cannot you trust your memory?

A. Yes, sir.

Q. Well, trusting your memory, what do you now say, whether you had, or had not, any pecuniary interest in the share of profits which Mr. Philip Semmer as a partner in the firm of A. C. Boyd and Company had?

A. I had no interest in it. We did not talk about it, and he was to give me a part of it, and then I saw the way he needed money so much, so we dropped that altogether, and I simply loaned him money on his stock.

Q. Have you refreshed your memory as to the time, whether before or after the organization of this company that you had any connection with A. Boyd & Co.?

A. Before or after the organization?

Q. Yes, the organization of the Pennsylvania Plate Glass Company. The papers seemed to be dated August 1st, 1890.

A. No, sir, I didn't refresh my memory, and I cannot—not at present.

Q. Have you examined in your papers for the instrument
264 which created you a trustee of A. C. Boyd & Co. which you said you occupied—the position which you said you occupied in your testimony yesterday?

A. Yes, sir, I have examined for all papers. I have examined for everything relating thereto and I cannot find anything.

Q. Was your appointment as such trustee in writing?

A. I cannot remember; I presume it was; I won't say positively, though.

Q. Well, when you became trustee did they make deposits of money with you?

A. They gave me money and I deposited it in their name, that is, in the name of A. C. Boyd & Co., and I signed checks as A. C. Boyd & Co., George Cowen, attorney for A. C. Boyd & Co.

Q. And from what sources did that money come?

A. That I cannot tell you.

Q. You never advanced any yourself?

A. Yes, I did.

Q. To A. C. Boyd & Co.?

A. Yes, sir.

Q. How much?

A. I cannot remember now.

Q. Do you recollect when?

A. No, but it was while the construction was going on.

Q. You never had any interest, I suppose, in any of the lands or other property of A. C. Boyd & Co., which subsequently was turned over?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. I call you attention to a paper proved in this case and marked "Defendants' Exhibit No. 66, H. D. Gamble, examiner," and ask you whether or not on the 10th day of June, 1890, C. W. Poole and his wife did not convey to you and Philip Semmer, by deed of general warranty the lands on which the plate-glass works of the Pennsylvania Plate Glass Company was erected.

By Mr. BLANC: I object to that in the first place because it is leading; in the second place because it is incompetent and calls for hearsay evidence; in the third place it is immaterial and irrelevant, and in the fourth place because the paper speaks for itself and has not been proved in this case.

265 A. Positively yes; I didn't know about it, but now I see he did convey it positively.

Q. Then it is true, as shown by this instrument, that you and Philip Semmer did take jointly the lands referred to?

A. Yes, sir.

Q. Do you now recollect having any interest in the natural-gas contracts and water contracts which also subsequently passed to the Pennsylvania Plate Glass Company?

A. No, sir; not unless I was in, I cannot remember; I didn't remember this until I saw it.

By Mr. SCHOYER: I offer "Defendants' Exhibit 66" in connection with this witness' testimony.

Q. What negotiations, or when were the negotiatons entered into resulting in this conveyance to you and Philip Semmer of the 10th of June, 1890?

A. I cannot recollect that I was present at all; I don't remember how it was; I am trying to think. Now, I remember this agreement was made with Mr. Poole, and he apparently had a little more interest in me than he had in Mr. Semmer, and I was a party to the conveyance of the land. I figure out that the agreement was the way it is written there, that if we didn't erect a plant there, why the land was to go back to Mr. Poole without any foreclosure or anything at all. There was practically no loss to either party.

Q. You notice in this Exhibit No. 66, the covenant and agreement on the part of yourself and Mr. Semmer to erect upon the said premises described in this paper a 40-pot plate-glass works, with the necessary annealing ovens, machinery appliances required to put the same in practical operation. Buildings to be of required size and suitable shape for the reception of the necessary machinery. The work upon said plant shall be begun by said second parties within — days from this date, and shall thereafter be pushed with as much rapidity as is practicable to completion, so that the said plant will be entirely finished and ready for operation not
266 later than the — day of ——, 18—. Reading that covenant will you now state, if you can, why if you had no connection with the contractors you entered into such a covenant.

By Mr. BLANC: I object to that for the reasons that I have objected to other questions concerning that paper.

A. For the very simple reason, as I said before, that Mr. Poole had more confidence in me than he had in Mr. Semmer, and he made me a party to it. I saw no harm in it, because if Mr. Semmer didn't start to build that plant within the necessary time why we wouldn't have to put any money in, but the land would simply revert to Mr. Poole again, and I saw it was accommodating to Mr. Semmer, and it wasn't doing Mr. Poole any harm, and it wasn't hurting me. That is as near as I can remember it; that appears to me the reason why I went into that.

Q. This don't refresh your memory very much?

A. It refreshed me now why I went in; I didn't know I was in until I saw the deed.

Q. How long had you known Mr. Poole prior to this 10th day of June, 1890?

A. Why, a very short while, if I knew him at all before that.

Q. He was a banker, was he not, in Irwin?

A. Yes, sir.

Q. And you were living in New York?

A. Yes, sir.

Q. And cannot you recollect how long it was that you had known Mr. Poole?

A. Well, it must have been—when was that, June?

Q. 10th of June.

A. Well, it was that season; it was after the winter; it must have been in the spring of the year that I went out there first.

Q. How did you come to go out to Irwin; what business did you have?

A. Nothing; Mr. Semmer took me out there.

Q. With reference to purchasing the plant?

A. Yes, sir; he showed me two or three places there.

Q. And at that time of course you were a trustee of the
267 firm or of the company?

A. No; no company was formed then.

Q. And you went out without any pecuniary interest?

A. Nothing at all; I went to see the country and see what natural gas was, something I never seen before, and we were very slack in the office and I had never been out as far as Pittsburg.

Q. And when you were out there then you conceived the idea of going into this plant?

A. No; he spoke of that before; Mr. Semmer was a crank on plate glass to my sorrow.

Q. He had then spoken to you before?

A. Oh, yes; he started to go in with me in the graining and polishing of glass, he had been in that before, and the duty on polished glass was—I don't know how much, and on the ground glass it was so much, and he figured that he could polish it so much cheaper by buying the ground glass, and that is the way I became

connected with Mr. Semmer. He wasn't in the plate-glass business all the time.

Q. In the stock which you acquired—the stock that you acquired you got from A. C. Boyd & Co., or from Philip Semmer or A. C. Boyd?

A. No; I don't think that I had much to do with A. C. Boyd, it was principally with Philip Semmer, but it was A. C. Boyd & Co.'s stock.

Q. And you made no payment to the company for that stock, but dealt with A. C. Boyd & Co. through Mr. Semmer or some other person?

A. In that stock that was given to me yes, that was through A. C. Boyd & Co.

Q. I notice on the stock book, November 24, 1891, stock certificate book (Defendants' Exhibit No. 5, H. D. Gamble), a certificate No. 307, for 1,000 shares, $100,000, to George Cowen, treasurer, which still seems to be outstanding; do you know how that is?

A. Is there anything else connected with that and I probably could recall my memory.

268 Q. I call your attention to Defendants' Exhibit No. 4, and ask you whether you kept that book and what it is?

A. No, sir; I never kept this book.

Q. I then call your attention to Defendants' Exhibit No. 2, H. D. Gamble, and ask you whether you kept this book, and what it is?

A. Part of it is in my handwriting and part of it is in somebody else's.

Q. Do you recognize that as your stock ledger?

A. Yes, sir; it is an account of the stock. I started that. It is a stock ledger, I guess, that is what it really is.

Q. Now, I want you to look at the account of yourself as an individual in that book (Defendants' Exhibit No. 2), and ask you if that is your account?

A. Why, the part that I wrote I am positive of, the others, of course, I am not so positive of.

Q. What didn't you write?

A. From here down isn't my writing (indicating).

Q. From what date, so that I can get it on the record?

A. 1893, I guess that is the first.

Q. November?

A. November, 1893.

Q. From there down is not your handwriting?

A. No, sir.

Q. And you don't recognize its correctness?

A. I don't know who wrote it even.

Q. But the entries don't recall themselves to your mind?

A. No; I couldn't remember one share and two shares.

Q. Now, turn to page 34, in that Exhibit No. 2. That is your account as treasurer, isn't it?

A. Treasury stock; yes, sir.

Q. Do you recognize that as your writing?

A. Yes, sir.

Q. Kept by you?

A. Yes, sir.

Q. Now, look at the entry of December 18, 1890, the top entry "To Wray E. Davis, release 6,050 shares" and the next entry "To Daniel Harrison release 1,225 shares."

A. Yes, sir.

269 Q. How did you as treasurer acquire that stock, do you know, sir?

A. Nothing except that I received instruction as treasurer to enter them that way. I cannot recollect what the circumstances were.

Q. If you should see the minute book of the transaction would that aid you?

A. It might; I wouldn't say positively though.

Q. I hand to you the minutes of December 18, 1890, in the minute book (Defendants' Exhibit 1, H. D. Gamble, examiner), and ask you whether you were not present at that meeting?

A. I cannot recollect; what date was that?

Q. December 18, 1890, just after the proceedings for the issue of the bonds.

A. I cannot recollect it; I may have been; I think I should have been there; there were very few meetings I did miss.

Q. But practically all the stock which seemed to have been outstanding in the hands of *bona fide* subscribers, to wit, Wray E. Davis 6,050 shares, and Daniel Harrison, 1,225 shares, at the time of that bond meeting returned to the treasurer of the company and remained there until afterwards disposed of?

By Mr. BLANC: I object to that on the ground that the minutes speak for themselves.

A. Well, this is 6,000 return—I am not a book-keeper, but the debit side is what we had, and the credit side is what we gave out.

Q. Well, these came back into the treasury, these two, by release?

A. Release, that is what it says, Wray E. Davis, release.

Q. They came back in your custody and control as treasurer, or the custody and control of the company?

By Mr. BLANC: Objected to because the minutes speak for themselves.

A. Is there any more information in that book as to the numbers?

270 Q. This is a copy kept at North Irwin, or what purports to be a copy. My question is plain and simple whether the stock came back to you?

A. I don't know whether it came back; I don't know whether it was necessary to have the stock back, or whether I was simply informed by the book-keeper to charge up this stock, that is the reason I want to see if they were numbered, or anything, and then I would try to recollect it.

Q. You have charged yourself as treasurer with these two amounts

and I ask you, therefore, if that stock didn't come back into your control as treasurer?

A. I cannot answer that; I don't know whether I got the stock back, or how it was unless I see the book and know how to get at it. If anybody is a book-keeper and will tell me I will do it.

Q. When you are charged with something, you know you ought to have it?

A. It is charged back in the treasurer's book positively.

Q. But you were treasurer at that time, treasurer of the company?

A. Yes, sir.

Q. And that amount of stock came back into the control of the treasurer of the company?

A. Was released, but you tell me they are not in this book.

Q. Of course the original certificates are not.

A. I tell you I am ignorant of book-keeping.

Q. What I want to get from you is that whereas the charter shows a million dollars of stock outstanding at the time of the bond meeting, still a million outstanding as early after that meeting as December 18th, yet 7,275 shares came back to the ownership of the company.

A. Yes, these two items are correct.

Q. So that at that time, December 18th, by virtue of those releases, the million dollars of capital which seems prior to that time to have been issued out of the company to individuals was to the extent of 7,225 shares returned to the company?

271 (By Mr. BLANC: Objected to on the ground that the witness has already stated all he knows about the subject, and that the records speak for themselves, and that the question is a mere argument.)

A. Why, I cannot answer that, I don't know whether we didn't issue new stock right then and there for it.

Q. Look at it and satisfy yourself and give me an answer.

A. I will say yes it was returned.

Q. I now turn your attention to the accounts of J. G. Beamer, page 228, Daniel Harrison, page 229, Thomas McKie, page 229, A. L. Norman, page 230, John A. Norman, F. Y. Clopfer and C. W. Poole on page 230, and the account of Wray E. Davis on page 232 of Defendants' Exhibit No. 2, and ask you who kept those accounts, and in whose handwriting they are?

A. Part in mine.

Q. Turn over to Wray E. Davis' page?

A. That is mine, my writing.

Q. I now turn your attention to the same exhibit, the account of Wray E. Davis, page 26, J. G. Beamer, page 30, F. Y. Clopfer, page 16, A. C. Norman, page 24, J. A. Norman, page 22, Daniel Harrison, page 18, and C. W. Poole, page 20, and ask you why these duplicate accounts with these individuals were kept on this book, the second account being put at the last part of the book with vacant pages intervening, from page 142 to page 228?

A. I cannot tell you.

Q. Which were the last; which entries were made last, which set of accounts—which were the original accounts?

A. I cannot tell you that either.

Q. I call your attention to Mr. Beamer's account on page 228, under date of November 5th, 1890, "To subscription from W. E. Davis, 50 shares, November 5, by cash for certificate No. 65," and ask you if that is correct?

A. That is in my handwriting, yes, sir.

272 Q. And the same is true, is it not, of page 30, that is in your handwriting?

A. Yes, sir.

Q. And that account is principally in your handwriting?

A. On page 30, yes, I guess that is in my handwriting.

Q. I now call your attention to the account of Daniel Harrison and Thomas McKie, are those in your handwriting?

A. Yes, sir.

Q. You keep those accounts?

A. Yes, sir.

Q. I see that Thomas McKie on August 1st, 1890, is charged with a subscription of 4,717 shares and on August 18, he is credited by an assignment from A. C. Boyd & Co. of 1,500 shares; do you know anything about that transaction?

A. No, sir, but I can imagine though that must have been the payment from the Pennsylvania Glass Company to A. C. Boyd & Co., I think so; I may be wrong.

Q. But in McKie's account, not the company's it is in Thomas McKie's account?

A. Well, I cannot tell you about it.

Q. And on November — he is also credited by an assignment of McKie's estate to Davis, that is your clerk, Wray E. Davis, 3,216 shares, do you know how that came about?

A. No, sir.

Q. I now call your attention to a treasurer's report purporting to be signed by you, and marked Defendants' New York Exhibit D, and ask you if that is your handwriting, and if that is your signature?

A. Yes, sir.

Q. Was that a correct statement at the time?

A. Yes, sir.

Q. I now call your attention to Defendants' New York Exhibit E and ask you if this report is in your handwriting and was made by you to the company?

A. Yes, sir, that is in my handwriting.

Q. In Defendants' New York Exhibit D under the date of January, 1891, bonds had been issued to what extent to A. C. Boyd & Co.?

A. 7,500.

273 Q. And I ask you now to look at Defendants' New York Exhibit E covering an account from February 6, 1891, to February 24th, and ask you how bonds at that time had been as shown by that account, had been delivered to A. C. Boyd & Co.?

A. 30,000 to A. C. Boyd & Co.

Q. How do you explain that 75,000 had been given in January of bonds to Boyd, and only 30,000 at the later date?

A. I presume that the directors gave me instructions when to pay them.

Q. Have you brought with you the bond book that I called for in the subpœna, the account of the bonds sold by the company?

A. I never had that book.

Q. Who did keep it?

A. That was kept in Irwin.

Q. Who had a right to keep it except the treasurer?

A. The $250,000 I kept those bonds in the safe deposit vaults, and whenever the directors instructed me to deliver a number of bonds to A. C. Boyd & Co. I delivered them to them.

Q. Well, where is your voucher for them, the account of the disposition that you made of them?

A. Why, the minute book shows that.

Q. Do you mean to say you kept no account of the bonds?

A. Simply a receipt from A. C. Boyd & Co. whenever I delivered them bonds.

Q. I asked you to bring any and all papers relating to this matter.

A. I have lost them; I have been looking for them.

Q. You were the treasurer until the company was sold out by the receiver?

A. No, sir.

Q. When did you resign?

A. I cannot remember; it must have been a year before that; I wouldn't be positive, but I think it was all of a year.

Q. All the bonds passed then to A. C. Boyd & Co. at one time or another?

A. Yes, sir; I am positive of that; just as the board of di-
274 rectors instructed me to deliver to A. C. Boyd & Co. I would do it. I kept them in the vaults here for safety.

Q. You at that time then, as you say, if I understand you,—you at the same time were the treasurer of the company and the trustee of A. C. Boyd & Co.?

A. Yes, sir.

Q. You occupied those two relations?

A. Yes, sir.

Q. Do you recollect any prospectus inviting a builder's loan, prepared by A. C. Boyd & Co., or by Philip Semmer in 1890, before the formation of the company, or about that time, inviting a loan of $80,000?

A. I think I do. Was it on tissue paper?

Q. I now show you Defendants' Exhibit No. 4, H. D. Gamble, and ask you if that is one of the impressions?

By Mr. BLANC: I object to that as calling for incompetent and hearsay evidence and that this witness had nothing to do with that contract.

A. Why, yes, I remember this, that is the reason I went into mak-

ing plate glass. I know what a sheet-glass factory costs, and sheet glass wasn't very good, and plate glass at $80,000 and paying a rich return I thought was going to be a big thing, but I found out by the time I got through they spent nearer $500,000 than $80,000. I know there was a terrible lot of money went out there. I knew nothing except that I saw that contract at $80,000, and I thought it was awful cheap.

Q. Did you ever see a reprint gotten up by some person, with the last clause put in, evidently gotten up by some ill-wisher?

(Objected to as utterly immaterial and incompetent.)

A. No, sir; I never saw that.

Q. I now hand to you a letter marked "Defendants' Exhibit No. 41, H. D. G., examiner," dated January 14, 1891, written to A. C. Boyd & Co., and signed A. C. Boyd & Co., per George Cowen, and ask you if that is in your handwriting?

A. Yes, sir, George Cowen, attorney.

275 Q. And also "Defendants' Exhibit No. 40, H. D. G., examiner," dated August 9, 1892, addressed to the Pennsylvania Plate Glass Co., Irwin, Pa., and signed by yourself, and ask you if that is your handwriting?

A. No, sir. The signature I believe is, but it is very odd; the signature I think is mine.

By Mr. BLANC:

Q. Are you sure that is your signature?

A. No, sir; I am not sure.

By Mr. SCHOYER:

Q. That appears to be a guarantee on behalf of A. C. Boyd & Co., does it not?

By Mr. BLANC: I object to the paper as incompetent and immaterial, and on the further ground that the paper has not been proved, and that it must speak for itself.

A. Yes, sir; that is a guarantee.

Q. I also show you "Defendants' Exhibit No. 42, H. D. Gamble, examiner," signed George Cowen, and witnessed by Phillip Semmer, December 22, 1892, and ask you if that is your signature?

A. I don't think this has anything to do with the Pennsylvania Plate Glass Company.

Q. Is that your signature?

A. That is my signature, yes, sir.

Q. Now, are you not able to say that is your signature to Exhibit No. 40?

A. I don't know whether it is or not; it don't look like it; I don't remember it; I can't recollect this at all.

Q. It is only the signature I am asking you about?

A. I won't swear that is my signature.

Q. Will you swear that it is not?

A. No, sir; I will not swear either way.

Q. Now, I hand you "Defendants' Exhibit No. 43," purporting to be a letter written on the letter-head of M. Cowen & Son, dated New York, December 18, 1891, addressed to Mr. A. C. Boyd, and purporting to be signed by yourself, and ask you whether
276 that letter is in your handwriting, and whether that is your signature?

A. That is my signature.

Q. Is it your handwriting, the body of the letter?

A. Yes, sir.

Q. I also hand to you "Defendants' Exhibit 44, H. D. Gamble, examiner," dated New York, June 17, 1892, addressed to A. C. Boyd, and signed George Cowen, and I ask you whether that letter is in your handwriting, and the signature is yours?

A. Yes, sir, the signature is mine and the body is mine also.

Q. I also hand to you "Defendants' Exhibit 45," purporting to be a letter dated at Irwin, October 21, 1892, addressed to "A. C. Boyd, Esq., Friend Boyd," and purporting to bear your signature, and ask you if that letter is in your handwriting and the signature is yours?

A. Yes, sir.

Q. Is it not true that you and Mr. Boyd on June 17, 1892, held the control of the majority of the stock of the Pennsylvania Plate Glass Company?

A. Boyd and I? I don't think so; we took Semmer with us.

Q. Read that letter (handing witness Defendants' Exhibit No. 44).

A. No, sir; according to this Mr. Semmer couldn't because Mr. Semmer needed Mr. Boyd and myself. Mr. Boyd and I were not in control.

Q. Then you and Boyd and Semmer controlled the majority of the shares of stock?

A. Yes, sir, in 1892.

Q. Is it not true that your holdings of stock were mainly shown on the books in the name of A. C. Boyd & Co.?

A. No, sir.

Q. And not in your own name?

A. No, sir.

Q. At any time?

A. At no time.

Q. You are quite sure about that?

A. Yes, sir.

Q. Did you get any of the 1,500 shares issued to A. C. Boyd & Co., August 30, 1890?

A. I got some of A. C. Boyd & Co.'s stock off Philip Semmer.

Q. And is it not true that on that same day there was is-
277 sued to you certificate No. 2 (I am reading from Defendants' Exhibit No. 5 now) receipted for by you, one share?

A. Yes, sir, and paid for.

Q. That came out of that 1,500 shares, didn't it?

A. Which, that one share?

Q. Yes.

A. No, sir; that is treasurer's stock, I believe; I think the book tells those things.

Q. Can you explain to me, sir, why there should be an entry of a certificate issued to you, No. 503, when the last regular issue on this stock book (Defendants' Exhibit No. 5) ends with 437?

A. I cannot unless the book-keeper happened to tear out a certificate from the back of the book instead of taking it in rotation. You see the book-keeper has torn that out and sent it to Irwin and he took it out of the back of the book probably to have it signed and stamped.

Q. How could the book-keeper sign it?

A. He didn't sign it; he sent it out to Irwin.

Q. But you signed it as treasurer?

A. Yes, out at Irwin probably. I will explain it, I see it now. The probabilities are somebody from Irwin wrote in that they wanted a couple of certificates, and in the meanwhile I had started out, and the book-keeper read the letter and tore out a couple of certificates, and sent them out, you see it reads "the certificates sent to George Cowen," and when I got out there I signed them, and they had the seal of the president out there, and I presume that is the explanation; it looks that way to me.

Q. I see your account on page 12 of this exhibit (Defendants' Exhibit No. 2) which is the stock transfer book, that on May 6, 1892, certificate 334 was issued to you from A. C. Boyd for 100 shares, and on the same date certificate 335 from A. C. Boyd, 100 shares, and on the same date from A. C. Boyd & Co. and C. W. Poole certificate 258, for 769 shares, and on the same date from A. C. Boyd & Co. certificate 359 for a thousand shares. Does that represent what you got from A. C. Boyd & Co. and Mr. Poole?

278 A. If Mr. Poole weren't in it I might say it all came from A. C. Boyd & Co., but Mr. Poole—I think I bought out some stock of C. W. Poole, I don't remember about that.

Q. I turn to the account which you kept in (Defendants' Exhibit No. 2), an account of C. W. Poole, page 20, dated May 6, 1892, certificate 318 from Poole for three shares.

A. Those were endorsed in blank; I cannot recollect that.

Q. Well, how many shares?

A. Three shares, $200, they are endorsed in blank by Mr. Poole.

Q. Now, I turn to the account of A. C. Boyd & Co., Defendants' Exhibit No. 2, H. D. Gamble, examiner, and ask you to point out on that account where A. C. Boyd & Co. gave to you the 769 shares, or any portion of 769 shares, and any portion of the thousand shares on May 6, 1892?

A. Why here it is.

Q. Count up and see what the total is.

A. Looking at my account I got 769 shares, represented by certificate 358.

Q. From whom did you get them, how much from Boyd & Co. and how much from Poole?

A. Three shares from Poole and the rest of A. C. Boyd & Co.

Q. That would be 766 shares from Boyd & Co.?

A. Yes, sir, and three shares from Poole.
Q. You of course paid A. C. Boyd & Co. for all the shares you got?
A. Yes, sir, paid Philip Semmer or A. C. Boyd & Co.
Q. And by check?
A. No, sir, by loans to A. C. Boyd & Co.
Q. When were those loans made?
A. During the construction of the plant.
Q. And was that by virtue of an understanding originally entered into that you were to make loans and would be compensated in that way?
A. No, sir, originally when that $80,000 plant was started in there, I thought I would advance the whole $80,000, and go in the plant, and not make a stock company or anything of it at all, but
279 when I found out it took a good deal more, I saw Mr. Wheeler Butler, and he said the plant cost nearer a million dollars, and I stepped out of the matter, and then Mr. Semmer wanted to make an arrangement to give me half the profits, and I did not want that either, and then I started and helped them along.
Q. When did you start to help them along, and under what arrangement was it you did help them along?
A. Almost at the beginning I started.
Q. How did it come that you agreed to help them along and what were the terms?
A. There were no written terms at all.
Q. Well, verbally?
A. Verbally it was understood that I was to get a good share of what Semmer made there; I had nothing to do with Boyd at all.
Q. And that you were to make the loans?
A. I didn't want to promise to loan them any specific sum of money there, for I didn't know where it would end.
Q. You were to make such advances as you thought proper?
A. Yes, sir, within my limit.

At 1 p. m. a recess was taken until 2 p. m.

*Afternoon Session.*

DECEMBER 17TH, 1897, 2 P. M.

*Appearances.*

Mr. Schoyer, for defendants, The Penn Plate Glass Co. and W. L. Kann.
Mr. Blanc, for the plaintiff.

*Testimony of George Cowen.*

GEORGE COWEN resumes the stand for further direct examination.

Direct examination by Mr. SCHOYER:

Q. Referring to that deed of the land from Mr. Pool and wife, and the date of the articles of charter which seems to be July 1st,

280 1890; I suppose you now are able to say that you were connected with these transactions before the organization of the company. The deed is dated June 10, and the articles of association July 1st, 1890?

A. Yes, sir.

Q. And recalling also the prospectus for the builder's loan, $80,000, which you at one time had entertained, and which you subsequently declined to go into, can you refresh your memory from those circumstances and say whether or not this check of $100,000 was actually money, or issued for the purpose of an apparent compliance with the laws of Pennsylvania that ten per cent. should be paid in?

Mr. BLANC: I object to that as calling for purely hearsay evidence.

A. I have been trying to think of that. I have been thinking and I haven't got it to my mind yet.

Q. I want to put it in this way, not that you can recall the actual transaction without some thought, but recollecting that you had entertained the idea of advancing the entire $80,000, to build this plant on a builder's loan, and that that preceded the organization of the company, and then that on the 1st of August there appears to be a check for $100,000, put into your hands and carried to your credit as treasurer, from those circumstances do you think that you got $100,000 in actual cash, or was it not in point of fact a form, a check simply given to comply with the requirements of the law that ten per cent. of the capital stock should be paid in in cash?

Mr. BLANC: Objected to on the ground it is incompetent and calls for hearsay evidence; and also that it calls for a conclusion from the witness; and also because it assumes to be facts statements which have not been proved.

A. I cannot answer that yet. It may come, because this question here about these thousand shares which you asked for some time ago, of stock, that was issued but there was no record of it. I was thinking of that at lunch. That was a loan they got of $20,000 or $30,000 in the bank. The company's note, if I remember
281 rightly, with my own individual endorsement. The company never paid that and I paid that note.

Q. And you have got the stock bill?

A. I don't know whether I turned that stock in or not.

Q. You can look at your accounts.

A. I don't think the accounts show, except the statement. Whether that was a collateral note and the stock attached to it I am not positive of that. I don't know how much the note was. I know it was either $20,000 or $30,000, and Mr. Boyd, I think, was on it, and Mr. Semmer and Mr. Pool and I.

Q. As treasurer of the company, the charter of course which was familiar to you that the entire capital stock appeared to have been subscribed for?

A. I don't think I ever saw that charter.

Q. Then as treasurer of the company you did not look at its valuable assets in the way of stock subscriptions?

A. As treasurer of the company all the moneys that came in at the start were given to me, and I deposited them in various banks.

Q. (Question repeated.)

A. I don't know how to answer that.

Q. You can say yes or no.

A. Will you make that question a little more full so I can grasp it?

Q. You were the treasurer of the Pennsylvania Plate Glass Company from its formation?

A. Yes, sir.

Q. Did you not inquire what you were to be treasurer of, the rights of action, the subscriptions and the assets of the company?

A. No, sir; I made no inquiries. I presumed that, as treasurer of the company, I was to handle all the money.

Q. That was all?

A. Yes, sir.

Q. Did you ever make any demand on Wray E. Davis to pay up $388,700 for 3,887 shares?

A. Personally, no.

Q. Officially?

A. That is, personally I did not.

Q. Well, officially in any way, by yourself or through another?

282 (Objected to on the ground it is immaterial and irrelevant.)

A. No, sir; I did not do it.

Q. Did you ever make a demand on Daniel Harrison of Pittsburgh, Pennsylvania, to pay $122,600?

(Same objection.)

A. No, sir; I did not.

Q. Did you ever make any demand of Thomas McKie to pay up $471,700, for 4,717 shares?

(Same objection.)

A. No, sir.

Q. Or upon any of the subscribers?

(Same objection.)

A. No, sir.

Q. On John A. Norman of New York city for 10 shares?

(Same objection.)

A. No, sir.

Q. Upon A. Livingston Norman for 10 shares?

(Same objection.)

A. No, sir.

Q. Upon Mr. F. Y. Clopfer for 50 shares?

(Same objection.)

A. No, sir.
Q. Upon Mr. C. W. Pool for 100 shares?
(Same objection.)
A. No, sir.
Q. Can you explain why you did not?
A. Why Mr. Semmer attended to that.
Q. But Mr. Semmer was not connected with the company at all, was he, at that time?
A. No, sir; I do not believe he was connected.
Q. Do you not know that under advice the members of the firm of A. C. Boyd & Co., the proposed contractors, could not be, or it was thought advisable that they should not be, connected with the company?

283 (Objected to as immaterial, irrelevant and leading.)

A. I didn't know that until I heard this letter read here yesterday.
Q. I understand then from your testimony that at the time of the formation of the company you were the treasurer of the Pennsylvania Plate Glass Company; you were before that time also trustee of A. C. Boyd & Co., the contractors?
A. At about the same time; yes, sir.
Q. And as early as June 10th, 1890, a grantee of the land upon which A. C. Boyd & Co. were to construct their plant, and prior to that you were familiar with a proposition for a builder's loan of $80,000 to construct a plant which you considered so favorably as to think that you yourself would advance the entire amount, but which you subsequently did not; that I understand to be the net result of your testimony on that point, is it not?

By Mr. BLANC: I object to the entire question as being leading and as stating as facts statements which have not been proven.

A. That proposition was not down in writing at the time, I don't think; it was Mr. Semmer's verbal proposition that it would take about that much to build the plant. I don't think I have seen that proposition. Then later he had it down in writing.
Q. What I have stated with this explanation of yours is about the net result of what you have stated on that point in your testimony today and yesterday?
A. I believe that is about the result of it.
Q. How did it come that with all this knowledge and this relation you permitted the Pennsylvania Plate Glass Company to become a purchaser, or a contractor with A. C. Boyd & Co. for $850,000 for the proposed plant?

By Mr. BLANC: I object to that as incompetent and immaterial.

A. I can't answer that. I don't know. I can't remember now what circumstances led up to that.
284 Q. Taking into consideration the fact as you have stated that you were to make advances to such amount as you

thought proper, and to be repaid out of the profits of Philip Semmer as a member of A. C. Boyd & Co., can you now answer that question?

(Same objection.)

A. No. I think I had a talk with Wheeler, or with somebody connected with the Charleroi works, and I think their plant was about the same size as the Pennsylvania, or Butler, I think it was, and that plant at Duquesne, Howard's works, and I think they figured those plants at about a million dollars, of about the same capacity as ours was. I am only guessing at this now. I think that is where we arrived at the price. I am not positive now.

Q. But Mr. Cowen, having known of the estimate of the cost given to you by the proposed builders, and the loan of $80,000 which they proposed to make, and considering also the fact that the larger the price to be paid by the Pennsylvania Plate Glass Company to A. C. Boyd & Company, the larger would be the profit of Phillip Semmer, in which you were to share in consideration of your advances, can you now explain why you permitted the Pennsylvania Plate Glass Company to contract to pay A. C. Boyd & Company $850,000 for the proposed plant?

By Mr. BLANC: I object to that on the ground it is immaterial and incompetent and stating facts not proved, and leading.

A. Why their statement was not carried out at all. They have here an $80,000 plant, and I saw some of their contracts with the men. They have grinding and polishing halls—no, that is not it. Seven grinding and polishing machines with separate engines, each engine complete at $3,500. Now, if my memory serves me right, they had seven grinders and twelve polishers. I am not sure about the number. Of course, the size of the buildings I can't re-
285 member how big—whether they made them as big as they specify here.

Q. I now repeat the question and refer to the time of the acceptance of the contract at the first meeting of the board of directors of the Pennsylvania Plate Glass Company and also refer you to the contract between A. C. Boyd & Company made the 30th day of August, 1890, and being Defendants' Exhibit No. 11, wherein they set out what work was to be done by A. C. Boyd & Company.

(Same objection.)

A. I can't recall. I imagine they must have stated their case and took in comparison those other plants, and it was simply my judgment that we ought to pay that much. I don't know how that was done. I don't know if I was there at the meeting.

Q. Did you not about August 7, receive an estimate of the probable cost of the plant from Mr. Boyd through Mr. Phillip Semmer amounting to $269,986.50?

A. Can I look at it? I may recall (letter-press copy book shown witness). *A.* I can't recall this.

Q. Were you not present at the meeting of the organization of the

company at which your appointment as treasurer was confirmed, here at Irwin, August 30th, 1890?

A. Could you give me anything that was done there that would refresh my mind?

Q. The contract was then proposed by Mr. A. Livingston Norman and the by-laws were read and approved and the officers elected and confirmed. On motion of Mr. Davis the appointment of yourself as treasurer for the ensuing year was confirmed.

A. If Mr. Davis was there I hardly think I was out there at the same time. Still, I ain't positive.

Q. Were you not out in Irwin at the date, August 1st, when the $100,000 check was given to you and deposited by you in the
286 Farmers' and Miners' Deposit Bank of P. S. Pool & Son at Irwin?

A. I think I opened that account out there, yes, sir. I don't think I sent out my signature.

Q. Can you now recall from whom you received that check of $100,000, the moneys or sources from which it came?

A. No, sir, not yet.

Q. Was it a check of A. C. Bord & Company?

A. I can't say.

Q. Was it a check on the Irwin national bank?

A. I wouldn't be able to recall what bank it was on.

Q. But it is a very large check, Mr. Cowen and if it meant $100,000 in money, is it not very natural?

A. If it had gone into my own pocket you know, I would have known what it was. I was trustee for that.

Q. You were trustee as treasurer?

A. And I knew I would not use any of that money for my personal use.

Q. But in your representative capacity of the plate glass company you would not be so careless?

A. I would look at it when it went in the bank. It was safe in the bank and as far as I was concerned I would not use a penny of it, and I don't believe I ever did use a penny of it.

Q. Did you not even look to find out whether the $100,000 check meant $100,000 in money which you as treasurer had the right to call your own as treasurer, nor even recall whose check it was, nor upon what bank?

A. It wasn't where one would deed away a piece of property and get the money for it and then find out the check was not good and be out the property and be out the check.

By Mr. SCHOYER: I object to that answer.

Q. (Question repeated.)

A. No, I can't recall it now. I am thinking and I will try to recall that some time.

Q. Mr. Cowen, I do not want you to think that I am treating you harshly in any way, nor imputing any intent of dishonesty?

A. I don't want to think so. I am trying to answer as honestly as I can.

Q. I now ask you as a man under oath in your own way to give me a knowledge of the entire transaction. Your company is
287 no longer existing; it has been sold out at receiver's sale; and now I want you to give me your own version of your connection with A. C. Boyd & Company or Philip Semmer or with this company, and your knowledge as to the mode of having subscriptions, who the subscribers were, and everything in relation to it.

By Mr. BLANC: I object to that question as asking the witness to testify again as to the matters to which he has already testified over and over again. I also object to the question because it does not specify anything upon which the witness is asked to testify but calls for a general history from him as to matters which may or may not be material.

A. Could you start to question me?

Q. Commence with Philip Semmer and A. C. Boyd & Company before the organization?

A. A. C. Boyd I didn't know before the organization. Philip Semmer I knew in New York from that glass-grinding business. He came to me and spoke about putting up a plate-glass plant probably a half dozen times, and then some of those meetings he gave me an estimated cost of what it would amount to, which brings it down to about $80,000. I don't know how long that lasted. He went out through Pennsylvania looking for a choice site, and he selected North Irwin, talked about all its advantages to me and everything else. I went out with him and apparently I became part owner of the land which Mr. Pool, as I regarded at that time—I think Mr. Pool did that so as to know he would have no trouble to get his land back if they didn't build. I saw no harm in that and knew that it was right if they did not build they had no right so keep the land, and naturally would give it all back. How Semmer got together with Boyd, I don't know. I don't remember what their contract was, but I do know that I was introduced to Boyd, whether in New York or in Irwin I can't tell, and I think they decided there that I should hold all moneys for them and pay their bills for the construction of the plant.

288 Q. Was it then that you were to make advances for making loans to them?

A. No, I don't think Mr. Boyd—Mr. Boyd was to attend to the building part and Mr. Semmer was to attend to the finances, and I was simply to check out the money. I don't think Mr. Boyd knew anything of the finances except casually what Semmer would tell him.

Q. What is the next step? When was it you made this arrangement for your loans and repayment out of the profits of Phillip Semmer?

A. Those loans came along when Semmer was short and needed money, and I knew that as well as he. When Mr. Boyd would send him the vouchers and there was no money there, why then Semmer would come and want to borrow some money and then I would make the deposits myself, my own money.

Q. When was the arrangement with Mr. Semmer about the repayment to you out of his share of the profits, to which you have testified?

(Objected to as incompetent and immaterial.)

A. I don't think I put it in that way. To the best of my knowledge I think I bought his stock whenever I gave him money, at a certain price, but I won't be positive about that. I don't think I made an arrangement with him.

Q. When did you first become advised of the proposition to form a company to contract with A. C. Boyd & Company for this plant?

A. I can't recall the first stages of that plate glass company. I don't know where I stepped in.

Q. What knowledge did you have of it?

A. I don't know where I began with the plate glass company. The Boyd matters that is the way it led up to, that is Boyd & Company.

Q. How did it come that Wray E. Davis became a subscriber for so very large an amount of stock?

A. Mr. Semmer manipulated all the beginning of that. I had neither the time nor the inclination, nor did I know anything
289 about corporations. I presumed that my duties there were as treasurer, that they elected me as treasurer so there would be no defalcation. I figured that was all they wanted me for.

Q. Here was Wray E. Davis in your office, your clerk, on what salary?

A. I don't remember now what he was getting.

Q. Was it over $1,500 a year?

A. Probably about $2,500.

Q. Appearing as a subscriber for a very large amount of stock. Had you not been advised by Semmer that he would use Wray E. Davis' name for that purpose?

A. No, sir; I was not advised. If I was, I can't remember it. I don't believe I was advised. I didn't know what was necessary for a company and didn't care to. Mr. Semmer was acting there under somebody's advice, whether it was an attorney or whether it was a man who had formed stock companies I can't say; but I didn't attend to the details at all.

—. When did you first know that Wray E. Davis was a subscriber to that amount?

A. I can't tell you that. I presume when I entered his name in the books, in the treasurer's books, the stock ledger, or whatever it is; maybe before; maybe Semmer sent me a list of them, but I won't say positive about that.

Q. Did it strike you with any surprise that he should become such a large stockholder?

A. I didn't know what was necessary, or whether it was a matter of form, or how those things were done.

Q. Did you not know as a matter of actuality that he could not take and pay for that amount of stock?

A. No, he could not of his own accord; no, sir; he could not.

Q. Then it occurred to you, did it not, that this subscription covered some person or firm of persons?

A. I don't know why it was made or for what reason. In fact, I didn't look into those matters because I knew nothing about corporations. I didn't know how that was done.

290 Q. Did you not have any conversations with Phillip Semmer? Did he not explain to you how it was done?

A. No; Semmer seemed to be content to do all that work; it was relieving me of work that I didn't want to attend to, and I simply felt that the only responsibility I had there was to look after the finances and see that I didn't spend any of it, and I felt awfully competent to do that part of the work.

Q. Did Wray E. Davis pay you any part of the ten per cent. of his subscription?

A. I think he did pay me something, and I won't say positively whether he paid it to me or whether Semmer gave me some money for him.

Q. $32,000?

A. No.

Q. Did Daniel Harrison pay to you ten per cent. on his 226 shares?

A. No, sir.

Q. Did Mr. McKie pay to you his ten per cent. on his 4,700 shares?

A. I can't remember McKie. He was an intimate frind of Semmer's. I have been trying to recall. I only met McKie once or twice. I know there was some deal on there I cannot recall.

Q. Did you receive a check or checks signed by the name of any of the subscribers of stock as set forth in the articles of association?

A. I think I did.

Q. Whose names can you recall?

A. I am positive I got a check from Mr. Clopfer. I won't be positive.

Q. I am speaking now of this $100,000. Do you not know that Mr. Clopfer's check was immediately returned to him the same day?

A. No, sir.

Q. You do not?

A. No, sir.

Q. What did you do with the check of Mr. Clopfer?

A. I deposited it, I am pretty positive.

Q. You will pardon me, Mr. Cowen, for again referring to that $100,000 check, but it seems so singular that a man of business and treasurer of a company should receive as cash and as being cash a check for $100,000 without verifying the check or being able

291 to recall whose check it was, or upon whose bank, whether it was certified or not certified, or whether any inquiry was made by you as treasurer as to the validity of the check.

Mr. BLANC: I object to the counsel stating in the form of a question matters which seem to reflect on his own witness. I object to the counsel making an argument in the form of a question.

A. That is a fact though. I think if I had my books I probably would know.

Q. Did you keep a cash book?

A. I kept only the cash book. Oh, the Pennsylvania cash book?

Q. Yes?

A. I think there were two or three different books. My impression is that I kept a check book. I know I had to sign the checks when I was treasurer. Now whether I kept the check book in New York and they sent me any vouchers, or whether they simply sent me the check to sign—sent it in from Irwin to New York for me to sign—I can't remember unless I see the check book. I think at first I kept the check book and then that got to be so incumbersome and they kept the book out there and sent the checks into me to sign.

At this point Mr. WILLIAM MCCULLOUGH, JR., was sworn for the convenience of the examiner.

*Testimony of Mr. Cowen Continued.*

Q. I now hand you Defendants' Exhibit No. 47, and ask you if that book was kept by you, the cash book of the Pennsylvania Plate Glass Company?

A. No, sir.

Q. It was not kept by you?

A. No, sir.

Q. That you see starts a year after the organization of the company. What is the first entry?

A. 7—22.

Mr. BLANC: I object to the witness stating any entries in a book that he cannot prove.

A. 7—22, that is July.

Q. Was there any cash book kept prior to that time—any
292 book prior to that?

A. Well, if you will tell me when the factory started to cast.

Q. I believe they did make an effort to astonish people on the 1st of July, 1891.

A. And this is July 22nd.

Q. What year?

A. 1891.

Q. Was there a cash book and transactions kept by you or within your knowledge for the year prior to that, the company being organized August 1st, 1890?

A. I can't recall whether there was or not. I think there was.

Q. Who kept the other which you cannot recall?

A. Who kept the cash book?

Q. Yes, the preliminary book?

A. I don't know who kept this book.

Q. Who kept the book preliminary to that?

A. I don't know what book-keeper was there.

Q. You recollect Zell, do you not?

A. Yes, I recollect Zell. I don't know who was there before Zell.

Q. Did you keep any cash book prior to the opening of this book, the page there before you?

A. I can't recollect that; I don't remember. I don't remember whether I did or not.

Q. I now turn your attention to the pinned pages on Exhibit No. 74 from page 1 to page 6, and ask you who kept those entries.

A. Not I.

Q. Who did?

A. I don't know. That is not my writing. I don't know whose writing that is.

Q. Where is the book which shows the transactions of the company prior to July 22nd, 1891?

A. I don't know. I don't know whether I ever had or whether I kept it.

Q. How were you able to make your account as treasurer without such a book?

A. Why the way I did it,—if they sent me the checks to New York they would send them only when they had money, and I would sign them. I knew if a check came to be signed that the bank would honor it.

293 —. Where did you get your data for these two treasurer's reports?

—. From the books out there, I believe. Now it may be that I had a book, but I won't be positive of that.

Q. You do not mean to say that you as treasurer of the company and liable to account did not keep a book under your own supervision by yourself or your own book-keeper that would enable you to explain what money you received and what money you paid out?

A. Not until they were in actual working order; then I knew when we sold goods and got in checks; then I kept a record of them. I don't know but what I kept a record before. I do remember though that I either copied it out of the book out at Irwin or I compared it with that Irwin account. I can't recollect which it was, when I would check up for the monthly statement.

Q. But as treasurer of the company you were aware that during the first year and before the works were completed large amounts of money had been given to A. C. Boyd & Company, and stock and also on the bonds?

A. Yes, sir.

Q. Did you keep no memorandum?

A. I only issued them when the directors advised me to issue them. I believe I did keep a memorandum.

Q. And where is that?

A. I don't know.

Q. Have you looked for it?

A. I have looked for any paper connected with the P. P. G. and

A. C. Boyd Company. I made no special effort for anything, but I looked for everything.

Q. Do you not know that the board agreed to sell the entire issue of bonds to A. C. Boyd & Company for 95 cents on the dollar?

Mr. BLANC: I object to that as incompetent and calling for hearsay evidence.

A. I think that was right. Yes, sir. I think they said something that they would have to pay a commission or something for
294 selling them and they didn't feel like losing it and they thought the company ought to allow it inasmuch as they didn't pay them in money. I believe there was something in the minute book, was there not?

Q. Yes.

A. Yes.

Q. In the proceedings for an increase of the indebtedness by issuing $250,000 of bonds you certified, did you not ask who the stockholders were who were entitled to a vote, and I hand to you a certified copy of a paper filed by the company under the law on the proceedings for such increase, being Defendants' Exhibit No. 8, H. D. Gamble, and direct your attention to a copy of the affidavit signed by yourself?

A. Yes, sir.

Q. From what sources of information did you get the names of those who were stockholders at that time?

(Objected to as immaterial.)

A. From the stock book, or the treasurer's ledger, or whatever it is.

Q. Do you happen to know whether this list corresponds with your book, your stock ledger, as of the date of the 15th day of November, 1890, which is the date of your affidavit?

A. Well, that I couldn't say now. I don't know whether I drew that list up or whether the book-keeper drew it up from the stock ledger and I signed it. I am not positive now whether it is an exact copy.

Q. What book-keeper?

A. I do not recall. It may have been my own. If it is in my own handwriting then I am sure it is an exact copy of the ledger.

Q. By this time, to wit, the 15th of November, 1890, were you not aware that Wray E. Davis was not a *bona fide* subscriber for 7,052 shares?

By Mr. BLANC: I object to that question as being absolutely incompetent and improper in form.

A. I couldn't answer that. If I get more familiar with dates. When is that—in November?

Q. November 15th, 1890. (Question repeated.)

A. I know afterwards he wasn't; he transferred his stock;
295 but whether I was aware of it on November 15th, 1890, I can't tell, unless you bring something more to my mind.

Q. When you made this affidavit you saw that he was put down for 7,052 shares?

A. Yes, sir, I took it down just what the treasurer's book showed for.

Q. You knew then he was a clerk in your office?

A. Yes, sir.

Q. And were you for one moment supposing that he was a *bona fide* subscriber for $705,200?

By Mr. BLANC: I object to the question on the ground that it is immaterial and irrelevant and incompetent because this witness has shown that he was the treasurer of that company and is estopped from denying the truth of affidavits made as such treasurer on behalf of this defendant.

A. And if you mean by a *bona fide* subscriber that he was to pay $705,200, no; if a *bona fide* subscriber is that he signed for that amount of stock, yes.

Q. I mean, of course, by a *bona fide* subscriber not the mere putting of his name down, but a contract to take and pay for the number of shares set opposite his name, which contract the company could enforce as a live asset of the company?

A. Well, I presume they could. Whether they could collect on it is different.

Q. From your knowledge, was such *bona fide* subscription according to the definition I have given?

(Objected to as immaterial.)

A. No, I don't think it was—for that much.

Q. Now, as to the subscription of A. Livingstone Norman for 10 shares; was he a *bona fide* subscriber in the sense in which I have defined it?

(Same objection.)

A. I heard him testify. I think he was. I think he sent in his bill there for services and he deducted the full value of his stock. That is, he allowed the full value.

Q. But that was after November 15th, 1890?

A. The date I can't say positively.

296 Q. But you heard his testimony?

A. I didn't listen to dates. But I know that he wouldn't pay cash.

Q. On this same date, November 15th, 1890, were you not aware that John A. Norman, his father, was not a *bona fide* subscriber for stock in the sense in which I have used the word- *bona fide?*

(Same objection.)

A. No, I was not. I heard that little tiff between the father and son here and that is something entirely new to me.

Q. A. C. Boyd & Company 1,500 shares on the 15th day of November, 1890, is on your list. What do you know about that? That is $150,000 before they were entitled under the contract to any-

thing, and after they had drawn out on August 30th, I think, $100,000, which was represented by the check which you deposited?

Mr. BLANC: I object to that on the ground it is immaterial and on the ground that it is leading and argumentative.
(Question withdrawn.)

Q. Do you not know that stock came from McKie's estate?
A. No, sir. *I* thought it came from the treasury for work done. I thought so.
Q. C. W. Pool is also on your list as of November 15th, 1890, for 100 shares. Is he a *bona fide* subscriber?

(Same objection.)

A. Yes, sir, I think he was a *bona fide* subscriber and I think he paid for it. I think he paid. I take it all back. Somebody out there paid by cash; paid half cash and gave me a note for the balance which I wouldn't take and I held the stock. Now, whether that was Pool or not you have got me again. I don't remember.
Q. Take F. Y. Clopfer, 50 shares, who was also on your list of November 15th, 1890.
A. Clopfer paid me, but I won't say positively there either.
297 You say I gave him back a check. I can't recall that and I don't know why I can't. I thought my memory was very good.
Q. Now take Daniel Harrison, he appears on your list for 1,226 shares. Was he a *bona fide* subscriber for $122,600?

(Same objection.)

A. He I think was Boyd's attorney and I think Boyd subscribed — him. Told him to put down those shares, and that either he or Boyd would pay. I don't know. I think they had some deal there. I won't say positively about him; I am not as positive about him as I am with Davis.
Q. At any rate on the strength of those proceedings the $250,000 of bonds were issued?

(Objected to as calling for a conclusion.)

A. That I don't know. We had the bonds issued certainly. The bonds were issued and if that was all that was necessary to get them issued that brought the issue, yes, sir.
Q. Those bonds all passed into your hands, did they not?
A. Yes, sir; the whole issue. I don't know where I got them from, but they were brought up to me in a lump and I took them down to the safe-deposit vaults and hired a lock-box there and kept them under lock and key.
Q. Until when; until they were issued, I suppose?
A. When I attended a meeting, and — think that the directors told me to deliver them to A. C. Boyd & Company.
Q. You know Mr. J. G. Beamer?
A. Yes, sir.
Q. On his account in that book before you, being Exhibit No. 2,

H. D. Gamble, on page 228, it appears that Mr. Beamer acquired stock through Wray E. Davis on November 5th, 1890?

A. November 5th; yes, sir.

Q. And he had acquired one share of stock prior to that time, had he not?

A. It says one share here.

Q. Look before at his account on page 30?

A. One share November 5th.

Q. Both the same date?

A. Yes.

298 Q. That was about the time he made a connection with the company as a shareholder, I suppose. He certainly had at that date?

A. Yes; I think he was elected a director then. I think that is the reason he bought that one share of stock.

Q. In your matter of trusteeship and interest in A. C. Boyd & Company and efforts to provide money, did you ever have any conversation with Mr. J. G. Beamer about the affairs of the company?

(Objected to as immaterial.)

A. About the affairs of the Pennsylvania Plate Glass Company?

Q. Yes.

(Same objection.)

A. I had conversations with Mr. Beamer; yes, sir.

Q. Now state when and where, and also the subject of the conversation; the first.

By Mr. BLANC: I object to that on the ground it calls for incompetent and hearsay evidence.

A. It was only general conversation, presumably, riding out to Irwin or back. Beamer was president of the Lloyds Plate Glass Company here—a pretty shrewd man—and I knew his judgment was good. I was going into a business here that I knew nothing about, and I knew my good money was in there and I wanted to have Beamer's opinion as well as my own. I didn't know how much further I would go in.

Q. Was there anything said at that time about the relation of A. C. Boyd & Company to the Pennsylvania Plate Glass Company, being contractors?

A. In which way?

Q. You explained to him, did you not, that A. C. Boyd & Company was going to build the plant for the Pennsylvania Plate Glass Company; that was talked over at least?

A. I think he was out at the time. I think they were building it.

299 Q. That is at Irwin?

A. You know when he came out there they were building the plant already, I think. I won't say positively. Can you give

me an idea how much time there was between A. C. Boyd & Company taking that title and the starting of the work there?

Q. The taking of the title to the land was June 10th.

A. Now, can you give me any idea when they started to dig?

Q. Yes; they started some of their excavation in July or August.

A. Well, Mr. Beamer didn't get out there. This is November 5th; put it a month ahead of time and make it October.

Q. Coming back to that conversation did the subject-matter relate to the prospects of the company, the contract?

A. No; the main thing was how good an institution plate glass was. How much the Lloyds might probably use of the glass and whether it was a good investment for me. I think I was talking then more for myself more than for Mr. Beamer. We may have talked of the other thing.

Q. What induced Mr. Beamer to go there, do you know?

A. I don't know. Of course it may have been he saw a future there. He was the president of the Lloyds Plate Glass Company. Whether he thought it would be a good scheme to be interested in a plate glass company at the same time or whether he thought he could make money.

Q. Do you know whether or not Mr. Beamer at subsequent times became interested in the way of raising money for the company?

A. For Semmer, yes, sir. I know he was, yes, sir, because I got some of Beamer's checks. I think he was a great source to get money.

Q. Did he become also a purchaser of the bonds and stocks from A. C. Boyd & Co.?

—. Yes, sir.

Q. Do you know the terms or any of them upon which he became a purchaser?

A. He dealt with Mr. Semmer and that is something that Mr. Semmer kept his mouth as tightly as he could. I know that
300 whenever he purchased bonds he always purchased stock with them and I asked Semmer over and over again what he sold the bonds for. I wanted to get an idea what they were worth; but I never could get it out of Semmer. And in order that I wouldn't get at it, it was never an outright purchase of bonds unless some stock was sold with it. So I couldn't make any calculation what the stocks brought or what the bonds brought.

Q. Could you make a calculation what the aggregate was?

A. The aggregate I had to take, you know.

Q. How did that compare with the face value?

Mr. BLANC: That is objected to as absolutely immaterial.

Q. Was it equal to par?

A. Oh, it was always more than the bonds; Semmer was too fly for that. I never could find out. I have asked Semmer that for my own reasons.

Q. Do you not know that there were heavy discounts on the sales of the bonds by A. C. Boyd & Co. or Philip Semmer?

Mr. BLANC: I object to that because the witness has already stated that he did not know anything about it.

A. With Mr. Beamer, no, because Semmer attended to that altogether. Mr. Beamer was downtown; Mr. Semmer would come to New York and he would run down and do all that work. I wasn't going to wet my feet, you know. It was enough that I was taking care of their funds, and when I balanced up I balanced up to the penny and there was no compensation there; and I thought I done enough with Semmer pounding on one side and Boyd on the other. But some bonds that they sold why I was present at one or two interviews there with Mr. McLean. I think it was Charley McLean.

Q. The president of the Lincoln national bank?

A. That is right. I know I was there and there was some bartering. I know it was less than par.

Q. It was 80 cents, was it not?

A. I can't remember. I think there was two or three pur-
301 chases. He bought one lot at one price and then he bought another lot at another price, and then I think he bought a third lot at another price. I think they got the bulk of the bonds. I think they made three bites of it.

Q. $130,000. Was it Fulton's bonds?

A. Mr. McLean bought it for Mr. Fulton, I think it was. Yes, Mr. McLean told me it was for Mr. Fulton, but he did all the negotiations. I am sure he bought it in two parcels. He paid for it in different parcels. He may have bought it all in a lump, but he paid for it in two or three bites.

Q. Do you not know, sir, that every time Beamer bought bonds and sent in a check there was a rebate for Mr. Beamer, an allowance back to him?

(Objected to as immaterial and as calling for hearsay evidence.)

A. I won't say yes and I won't say no to that. There was something underhand.

Mr. BLANC: I move to strike that answer out as not responsive and incompetent.

A. I can't tell you. Stock went with bonds.

Q. But was there not a rebate check or something?

A. I never gave him a rebate check.

Q. In some form or another there was a rebate allowed to Mr. Beamer within your knowledge of such transactions, one or more of them?

(Objected to on the same ground.)

A. Not between Beamer and A. C. Boyd & Company.

Q. But between Beamer and Semmer?

(Same objection.)

A. I mean not between Beamer and Semmer.

Q. Then between Beamer and A. C. Boyd & Company?

(Same objection.)

A. No, not between those concerns at all.
Q. Between Beamer and whom then?

(Same objection.)

A. I think there was between Beamer and Lloyds.
302 Q. Lloyds Plate Glass Company?
A. Yes, I ain't positive, though. No, there was no rebate. If I remember rightly, Beamer gave me a check for some bonds.

By Mr. BLANC:

Q. For these bonds?
A. Yes, for these bonds. He gave me part for them and then I think he brought me a check from the Lloyds. It was made to my order as treasurer and he had paid for those, and I think I endorsed that check over to Beamer. There was something like that.

By Mr. SCHOYER:

Q. Do you recollect how much that check was?

Objected to as incompetent and immaterial.

A. No, I don't know how many bonds there were.
Q. Do you not know that all the bonds that Mr. Beamer bought he bought directly from A. C. Boyd & Company or Philip *Beamer?*

(Objected to as hearsay.)

A. Direct from Philip Semmer.
Q. And not from the company?
A. No. The company had no bonds.
Q. Do you recollect over how long a period these purchases were being made by Mr. Beamer?

(Objected to on the same grounds.)

Q. Not all the same transaction?
A. No. Until the bonds were out; until they were all sold.
Q. Do you know whether or not Mr. Beamer was on the finance committee that financed the bonds prior to their issue, appointed by the directors?

(Objected to as incompetent and calling for hearsay evidence.)

A. To sell the bonds?
Q. Finance them. I suppose sell them. I turn your attention to the minute book. I show you the minutes of November 15th, 1890, page 23 of Defendants' Exhibit No. 1, H. D. Gamble, examiner. Inform yourself in respect of Mr. Beamer.

303 By Mr. BLANC: I object to the witness refreshing his recollection from minutes he did not make.

A. I can't recall that.
Q. Were you at that meeting?
A. I don't remember. November 15th? I think I was.

Q. Many of these bonds were hypothecated as collateral security for loans, were they not, and were continued for some time?

(Objected to on the ground it is hearsay.)

A. Some of them were, yes, sir.

Q. Do you not know that some of these bonds so hypothecated were sold within a year or so?

(Same objection.)

A. Within two years, I think. Maybe a year and a half.

Q. There were twelve bonds purchased by Mr. Nathan Hutkoff?

(Objected to on the ground that it is immaterial and calls for hearsay.)

A. Yes, sir.

Q. You know the facts?

(Same objection.)

A. Two years, yes, sir.

Q. Do you know how recently Mr. Beamer became possessed of bonds, of loose lots?

(Same objection.)

A. No. I don't know how many he holds, but he held forty or fifty.

Q. How many of them did he sell to the Lloyds Plate Glass Company, do you recall?

(Same objection.)

A. Either five or ten or twelve. I know it was a part of them. I don't remember how many there were. Either five or ten. There is another check of five or ten thousand dollars that I can't remember.

304 Q. From Beamer?

A. No, we got that check right straight. That is, I endorsed it and gave it to him back.

Q. Gave it to Beamer?

A. Yes, sir. He had paid for the bond.

Q. Do you recollect the occasion of the return of capital stock to the company?

A. Yes, sir.

Q. What was the purpose of that?

A. Why to ease up the losses there. They lost so much one year that Semmer and Boyd agreed to return some stock to the treasury which would naturally decrease the capital of it and not show the deficiency there.

Q. That amount was $119,000, was it, the loss?

A. Something like that, yes, sir.

Q. And the stock then was returned and a new balance-sheet made up wiping out the loss?

A. Yes, sir. Returned them to the treasury.

Q. Was that the stock to which you referred in this guarantee that was exhibited to you this morning?

By Mr. BLANC: I object to that because the witness says he does not know whether that is his signature or not.

A. I don't remember whether this is it or not.

Q. $24,000. It was not that, I suppose?

A. No, I don't think this was it. I don't remember what this was.

Q. Have you got the letter written by A. C. Boyd to you dated February 27, 1892?

A. I don't remember. If you will tell me the purport of it I will tell you whether I received it.

Q. Look at this and see (handing letter-press copy book to witness).

A. I won't say positively whether I received just this letter, but I did receive letters in reference thereto. I presume I received that letter also.

Mr. SCHOYER: I offer this in connection with the testimony.

By Mr. BLANC: I object to the reception of this letter on the ground that it is absolutely immaterial and irrelevant. It
305 does not appear to concern this transaction at all. I do not object to it on the ground that it is a copy.

Mr. SCHOYER: I offer in evidence page 7 of Defendants' Exhibit No. 10, H. D. Gamble, examiner, being a copy of a letter addressed by A. C. Boyd to the witness and dated February 27, 1892.

Marked Defendants' New York Exhibit F, H. D. G., examiner.

Q. Mr. Cowen, do you know the arrangement made between Mr. Beamer and Mr. Semmer by which he was to be interested in the Pennsylvania Plate Glass Company and to receive an appointment as director and vice-president on a salary?

(Objected to on the ground it is immaterial and incompetent and also hearsay, and is leading in form.)

A. I believe that Mr. Semmer told Mr. Beamer after Mr. Beamer had looked at the plant once or twice and interested himself enough, that he could become a director; that he would have the position of vice-president there. The question of salary I don't know at what meeting that came up.

Q. I am speaking of a private arrangement. He did get a salary afterwards as vice-president?

A. Yes, sir, there was a salary to all the offices except the treasurer.

Q. Were you interested in the Irwin Natural Gas Company which was under contract with the plate glass company?

A. Latterly, yes; not at the start of the plate glass company, but after the company was started I think Mr. Semmer said that they could buy the natural gas company's stock and I think he made a deal for that.

Q. In which you were interested?

A. I think I was interested there one share.

Q. Were you a party to the transaction by which that contract with the natural gas company passing to the Pennsylvania Plate Glass Company was cancelled?

(Objected to on the ground that it is immaterial.)

306 A. Cancelled by whom?

Q. By the plate glass company and the Irwin Natural Gas Company, the contract surrendered.

(Same objection.)

A. I don't remember that there was a contract cancelled at all.

Q. Were you a party to the arrangement by which the water company's contract passing to the Pennsylvania Plate Glass Company was also cancelled?

(Same objection.)

A. With the water company, if I remember rightly, they changed the contract or made a different contract with them—gave them some land.

Q. Were you a party to that?

A. I don't remember whether I was or not.

Q. You know, do you not, as the trustee of A. C. Boyd & Co. and as treasurer of the Pennsylvania Plate Glass Company, that all the payments to A. C. Boyd & Co. were made before the plant was fully completed and accepted by the company?

A. I can't recall that. I think the minutes had that. I think they held back the last payment until—there was some question there about the electric light, I think, and I know A. C. Boyd & Co. said they shall have to and the others said they didn't want to. I have just got a dim recollection of it.

Q. They got the whole $250,000 of bonds, however, from the first?

A. Yes, sir; they got all of those.

The cross-examination of Mr. Cowen is to be taken up on Monday morning at 10 o'clock.

Adjourned to Saturday, December 18th, 1897, at 11.30 o'clock a. m.

307 NEW YORK, *December* 18, 1897.

Met pursuant to adjournment.

Same appearance.

*Testimony of William McCulloch, Jr.*

WILLIAM MCCULLOCH, JR., called as witness in behalf of defendants, being duly sworn and examined, testified as follows:

Direct examination by Mr. SCHOYER:

Q. Where do you live?

A. New York city.

Q. What business?

A. Plate-glass business.
Q. With what concern?
A. Pittsburgh Plate Glass Company.
Q. What was your connection, if you ever had any, with the Pennsylvania Plate Glass Company at Irwin?
A. I went out there on the 6th of July, 1892, on the distinct promise made to me by Mr. Cowen that I would be appointed secretary of the company.
Q. You went out there and entered into the employ of the company?
A. Yes, sir, entered into the employ of the company on the 6th of July, 1892.
Q. And how long did you stay there?
A. Until the end of January, 1893.
Q What were your duties actually?
A. My duties were largely in the factory looking after the product and demand.
Q. Were you familiar with the books of account?
A. Not with the ledger or cash book, but the manufacturing book I was familiar with.
Q. I want you to look at Defendants' Exhibit No. 74, H. D. Gamble, examiner, and ask you whether you recognize this book as the cash book of the company?
A. I do.
Q. Your duties keep you at the works?
A. Partly in the office and partly in the factory.
Q. And had you occasion to know what the books of the company were?
A. I seen the books almost daily.
308 Q. Saw entries made in the regular business of the company?
A. Yes, sir.

By Mr. BLANC:

Q. Did you make entries yourself?
A. Not in the cash book or ledger.

By Mr. SCHOYER:

Q. But you saw them made?
A. Yes, sir.
Q. And you know these to be the books of the company?
A. I know that to be the cash book of the company.
Q. I also turn your attention to the ledger, the book called the ledger, and marked Defendants' Exhibit No. 73, H. D. Gamble, and ask you to state whether or not you recognize this to be the ledger?
A. Yes, I had occasion to recognize that book, because part of the manufacturing product goods went into that book.
Q. I now hand you Defendants' Exhibit No. 4, and ask you if you recognize that book and what it is?
A. Yes, sir, I recognize the book and it is a copy of the stock ledger.

Q. In whose handwriting is it?

A. In mine.

Q. And is a book of original entry?

A. No, it is a copy that was made by the instructions of Mr. Adams. The original book used to be kept in the office here, in the office here in Canal street by Mr. Cowen, and Mr. Adams wanted to keep a copy out there, and he directed me to make a copy of that book.

Q. I now turn your attention to Defendants' Exhibit No. 2, H. D. Gamble, examiner, and ask you if you recognize that as the book of the company, of the Pennsylvania Plate Glass Company?

A. I do.

Q. I wish you would state what this book is? (Handing witness Defendants' Exhibit No. 2.)

A. That is the stock transfer book.

Q. Is that the one from which the copy was made, Exhibit No. 4; did you make this copy, which is Exhibit No. 4?

A. Yes, sir.

309 Q. And where did you say this book was usually kept?

A. This book (Exhibit No. 2) was usually kept in New York by Mr. Cowen, the treasurer.

Q. And did you ever see it at Irwin?

A. Only when I made the copy; we insisted on having a copy out there.

Q. Then it was sent on to be copied?

A. Yes, sir; and we sent it back as soon as I made the copy.

Q. At the time you made the copy of Exhibit No. 2 in Exhibit No. 4, did you make a correct transcript?

A. It was verified by Mr. Adams at the time.

Q. And you verified it yourself?

A. I called them off from one book as he checked them.

Q. Then whatever changes may have appeared in Exhibit 2 of matters prior in date to that Exhibit No. 4, to the making of Exhib. No. 4 were afterwards put in?

By Mr. BLANC: Objected to as calling for a conclusion.

A. Must have been.

Q. I wish you would look at the open entries——

By Mr. BLANC: I object to this witness refreshing his memory from any entries in these books except those which were made by himself in the original books, and not in copies; and secondly to his giving any testimony in connection with the items in this book, on the ground that he has not been shown competent.

Q. Now I wish you would say whether or not you, at any time while you were employed by the company, found books, cash books or ledger preceding, or for dates preceding Exhibit 74 and Exhibit 73?

A. No.

Q. Now, tell me when these books appear to have been opened, as to what dates (handing witness Exhibit No. 74)?

A. 1891, the first date given is the 24th of July.

Q. Now, turn over a few pages, and see whether this book has been reopened?

A. Reopened on the 22nd of April, 1891.

Q. On what page is that?

A. Page 7.

310 Q. And I also call your attention to Exhibit No. 73, and ask you whether or not there has been a reopening in that book on page 2?

A. Yes, sir.

Q. The first entries from June 30th, 1891, to November 30th, 1891, appear to have been stricken out?

A. Yes, sir.

Q. And do the new entries cover the subject-matter of those erased entries?

A. I am not positive of that.

Q. Now, I want to call your attention to the merchandise account, page 300 of the ledger, being Exhibit No. 3, H. D. Gamble, and ask you to look at the opening entries of the merchandise account?

A. Yes, sir.

Q. Commencing August 19, 1891, and continuing to November 30th, 1891, and I ask you whether they have been erased and reopened?

A. They have, yes, sir.

Q. I now turn your attention to page 724 of the ledger, Exhibit No. 73, and ask you if you know anything about the $120,000 entry of profit and loss December 22nd, 1892, in that account?

A. I do.

Q. What do you know about it?

A. By the instructions of Mr. Cowen a profit and loss account was made. A balance-sheet was made up and submitted to him on the 22nd of December, 1892, bringing out a loss.

By Mr. BLANC:

Q. Did you make it up?

A. I saw it made up and part of it was made up of information furnished by me from the manufacturing department, and on the 22d of December this trial balance-sheet was made and submitted, bringing out a loss of $119,500, and the annual meeting was coming on on the 11th of January subsequent, and that was a balance-sheet that they could not submit to the stockholders with any degree of confidence, as they were endeavoring to try and raise some money at the time, and Mr. Cowen came on from New York and consulted with Mr. Semmer and Mr. Boyd, and among them they agreed that they should produce $120,000 of the worth of common stock

311 of the company, held jointly by the three individuals, and place that to the credit of the profit and loss account and bring out a credit balance of $500, and they thought that was a balance-sheet that they could submit to the stockholders with some degree of confidence, in view of the fact that we had been shut down in September on account of the water famine.

By Mr. SCHOYER:

Q. And that was done, was it?
A. Yes, sir.
Q. And then a new balance-sheet was made up?

By Mr. BLANC: I make a *motion to strike out the entire* answer of the witness on the ground that it is incompetent and irrelevant, and that the witness is testifying as to hearsay, and that it is immaterial to the issues in this case.

A. Yes, sir.
Q. Showing what?
A. A profit of $500.
Q. And wiping out the loss?

(Same objection.)

A. And wiping out the loss of $119,500.
Q. I now turn your attention to the account of profit and loss, page 334 of the ledger, Defendants' Exhibit No. 73, and ask you if you will point out the entry there in that respect.
A. December 22nd, by treasurer's account, folio 140, $120,000.
Q. Do you know anything about the book marked Defendants' Exhibit 1, H. D. Gamble, examiner, purporting to be in the minute book of the Pennsylvania Plate Glass Co.?
A. I do.
Q. Have you seen that in use?
A. I have seen it frequently.
Q. At board meetings and other times?
A. Yes, sir.

By Mr. BLANC: I note now an objection to any testimony given by this witness in connection with this book for the same reasons that I objected to his testimony in connection with the other book.

312 Q. What became of the original balance-sheet showing the loss, and the amended balance-sheet showing the profit?
A. That was retained in the custody of Mr. Cowen.
Q. Were either of them exhibited to the board?
A. That never was; that one never was.
Q. The original one you mean?
A. The original one.

By Mr. BLANC: I object to this testimony on the ground that it calls for hearsay evidence.

Q. Do you know whether or not the matter was brought to the attention of the executive committee?
A. It was not.
Q. Do you know whether it was brought to the attention of Mr. James G. Beamer?

(Same objection.)

A. Not to my knowledge.

Q. Are you familiar with the handwriting of Mr. Cowen?
A. I am.
Q. Have you seen him write?
A. Frequently.
Q. I now hand you Exhibit No. 40, H. D. Gamble, examiner, dated August 9, 1892, and ask you if you recognize that handwriting there in the body, or the signature?
A. The body is in Mr. Cowen's writing and the signature is his.
Q. I now hand you Defendants' New York Exhibit G, H. D. Gamble, special examiner, and ask you whether you are familiar with the signatures to that paper?
A. I am.
Q. Do you recognize Mr. Beamer's signature?
A. With the exception of Mr. Beamer's, Cowen, Boyd and Norman's I recognize.
Q. You don't recognize Mr. Beamer's?
A. I am not so familiar with his signature as I am with the others.
Q. I now hand you a paper marked Defendants' New York Exhibit H, and also a paper marked New York Defendants' Exhibit I, and ask you if you have seen those papers before, and if your handwriting appears any place on them?

(Objected to as immaterial.)

313 A. Yes, sir.
Q. Do you recognize those papers as official papers of the Pennsylvania Plate Glass Company?

By Mr. BLANC: Objected to on the ground that the witness hasn't been shown competent to testify to these facts.

A. I do.
Q. The numbers of the sheets bearing your handwriting are what?
A. On this exhibit (referring to Exhibit H), on pages 1 and 2, are in my handwriting, with the exception of the foot-note.
Q. What is the purport of it?
A. This is a copy of the common stockholders.
Q. Showing the names of the stockholders?
A. Yes, sir.
Q. And the number of shares?
A. Yes, sir.
Q. Now, look at the other exhibit and tell me.
A. This double sheet of fool's-cap in Exhibit 1 is in my handwriting, showing the names of the stockholders and the shares against each name, with the exception of the foot-notes.
Q. Do you know, sir, whether the conversation was made?

By Mr. BLANC: Objected to on the ground that it calls for incompetent and hearsay evidence.

A. Yes, sir.
Q. I now hand you Defendants' Exhibit No. 3, H. D. Gamble, and

ask you if you recognize that book as a book of the Pennsylvania Plate Glass Company, in use when you were there?

A. Yes, I do recognize it.

Q. What is that book?

By Mr. BLANC: I object to the witness testifying as to anything connected with this book, on the ground that he hasn't been shown competent.

A. It is the preferred stock ledger of the Pennsylvania Plate Glass Company.

314 Q. In whose handwriting is that?

A. In the handwriting of Mr. Zell.

Q. Who was Mr. Zell?

A. The book-keeper of the Pennsylvania Plate Glass Company.

Q. Had you anything to do with the stock certificate book?

A. Nothing at all.

Q. What time did you leave the employment of the company?

A. 31st of January, 1893.

Q. When did Mr. Adams leave?

A. About the 1st of January, 1893. I might qualify that by saying that he left about the 1st of January, and he came back again on the 11th again of the same year.

Q. He did come back?

A. Yes, for that was the stockholders' meeting, and he came back to be present at that meeting.

Q. Only for a day though?

A. Yes, sir.

Q. But his official connection terminated when?

A. On or about the 1st of January, 1893.

Q. Do you know whether James G. Beamer was a director and vice-president of the company during the time that you were connected with it?

A. Yes, sir.

By Mr. BLANC: Of course it is understood that all of the testimony of this witness is subject to the general objection that we are taking, on the ground of immateriality and incompetency, and owing to the character of the suit, and I now make the usual motion to strike out all this testimony on that ground.

Cross-examination by Mr. BLANC:

Q. You say that when you entered in the employ of this company you went out with the understanding or promise made by Mr. Cowen that you were to become secretary?

A. Yes, sir.

Q. Was that promise carried out?

A. Never.

Q. You were rather disappointed, were you not?

A. I was.

315 Q. And felt offended at Mr. Cowen personally?

A. Yes, sir; at the time I did.

Q. You were not at all well disposed towards him at that time?
A. I wouldn't like to put it as strong as that.
Q. You were very much annoyed and incensed?
A. I was living on the promise from the 6th of July until the board meeting in January, and I never got it.
Q. Have you since made up your differences with Mr. Cowen?
A. I met him occasionally.
Q. But you haven't been hobnobbing with him?
A. I never did.
Q. What was the precise capacity in which you served this company?
A. Partly in the office and partly in the factory.
Q. What did they call you; what was the name of the office that you filled?
A. Well, I did a large part of the secretary's work.
Q. Did you keep the minutes of the company?
A. No, I did not.
Q. Did you write the letters of the company?
A. I didn't write them, but I signed a good many of them in connection with sales, and the manufacturing department.
Q. Only in connection with the sales and the manufacturing department?
A. Yes, sir, and the pay-rolls.
Q. But it was no part of your duty to keep the books of the company?
A. No; but it was part of my duty to consult those books occasionally.
Q. Occasionally?
A. Yes, sir.
Q. Only that concerned the manufacturers?
A. Yes, sir, and some pay-rolls.
Q. Your entire knowledge of these books is derived from that examination?
A. Largely; yes, sir.
Q. You never made any entries in them?
A. Not in the ledger or the cash book.
Q. Never?
A. No.
316 Q. Were you a member of the board of directors?
A. I was not.
Q. Did you ever attend any of the meetings of the board of directors?
A. I have been frequently called in.
Q. Did you ever attend any of the meetings?
A. Not in an official capacity.
Q. How often were you called in—at most of the meetings?
A. Most of the meetings while I was there I was consulted.
Q. For a part of the time?
A. Until they got all the information from me they wanted.
Q. And then you would leave?
A. Yes, sir.

Q. And you wouldn't care to be understood here as saying that you knew what went on at the directors' meetings?
A. No; I do not.
Q. The information they sought to get from you was altogether information concerning the manufacturing department?
A. Largely.
Q. What other information?
A. Well, about the pay-rolls and collections.
Q. What sort of collections?
A. Collections made for glass.
Q. In other words, you were the manager of that department?
A. I was, *ex officio*, if you like to put it that way.
Q. You were not a member of the executive committee?
A. No, sir.
Q. Nor did you attend at their meetings except in the same way?
A. No, sir, unless I was consulted about something.
Q. Concerning your department?
A. Principally, yes.
Q. Now, did you ever have any connection with this company prior to the 6th of July, 1892?
A. No, sir; never.
Q. Up to that time you were living in New York?
A. Yes, sir.
317 Q. From the 6th of July, 1892, the date when you left New York, you said, to January 31, 1893, you lived out there?
A. I lived out in Irwin.
Q. And gave your entire time to the company?
A. Entire.
Q. You have testified in regard to certain entries in the ledger. You didn't make those entries?
A. No, sir.
Q. Did you prepare a statement from those entries?
A. The book-keeper did.
Q. You did not?
A. I was present when it was prepared.

By Mr. BLANC: I move to strike that out.

Q. You did not prepare it?
A. I did not prepare it.
Q. It was no part of your duties to prepare it?
A. No.
Q. And all your knowledge with regard to that statement was derived from what you heard from others?
A. No, from what I saw, not from what I heard.
Q. Not from what you yourself did?
A. No.
Q. How can you say of your own knowledge that the original statement was never submitted to the board of directors; was it a part of your duty to submit it?
A. No, the book-keeper's.

Q. You cannot say whether the book-keeper ever did submit it?
A. I can say that the book-keeper never submitted it; it was never put before the board of directors.
Q. You never put it before the board of directors?
A. I did not, and I know it wasn't.
Q. How do you know that?
A. Well, I know that this $120,000 was engineered down there.

By Mr. BLANC: I move to strike that answer out as not responsive.

Q. How do you know that?
A. That it wasn't submitted? I know that the amended one was submitted.
318 Q. How do you know that the amended one was submitted?
A. From information that I got from the president.
Q. No other way. You were not present at the meeting when it was submitted?
A. No, I was not.

Redirect examination by Mr. SCHOYER:

Q. Is your feeling in respect to Mr. Cowen of such a nature as leads you to vary from the truth in your testimony?
A. Not the slightest.

By Mr. BLANC:

Q. Whose employ are you in now?
A. The Pittsburg Plate Glass Company.
Q. Do you know whether Mr. Kann is interested in that company?
A. Not that I am aware of.
Q. Is his concern a competitor of the Pittsburg Plate Glass Company?
A. Oh, yes.
Q. What position do you fill there?
A. Plate-glass salesman.

*Testimony of C. W. Poole.*

C. W. POOLE, called as a witness on behalf of the defendants, being duly sworn and examined, testified as follows:

By Mr. SCHOYER:

Q. Where do you live now?
A. Partly in Pittsburg and partly here. I stay here most of the time.
Q. Where were you living in 1890?
A. In Irwin, Penna.
Q. What was your business at that time?
A. I was in the banking business there.

Q. What was the name of that bank?

A. Farmers' and Miners' deposit bank.

Q. Were you at any time connected with the Pennsylvania Plate Glass Company?

A. I was.

Q. Those works were situated at North Irwin?

A. Yes, sir.

319 Q. What positions, if any, did you hold?

A. I was president, the first president of the Pennsylvania Plate Glass Company.

Q. And how long a time did you continue to be president?

A. Some time in 1892; I don't know that I can give you the date.

Q. Who succeeded you?

A. Mr. Adams. I was president up to about July, 1892.

Q. I hand you Defendants' Exhibit No. 7, H. D. Gamble, examiner, being the charter of the Pennsylvania Plate Glass Company, and ask you—direct your attention to your registry therein as a stockholder for one hundred shares, and of your appointment as a director, and to your signature to that instrument, and also your signature to the affidavit, and ask you whether you recognized those as signatures of yours.

A. I do.

Q. Did you ever subscribe or purchase or agree to purchase any stock from the Pennsylvania Plate Glass Company?

A. I never purchased any.

Q. Did you ever purchase any stock from any person?

A. I did from A. C. Boyd & Co.

Q. In this paper Wray E. Davis, New York city, is mentioned as a subscriber for 3,887 shares of the capital stock. Was he a *bona fide* holder or subscriber to stock of the company, or was he a cover for others?

A. I understood he represented others; I always understood he represented another person in the company.

Q. Daniel Harrison, of Pittsburg, 1,226 shares?

A. He represented Mr. Boyd; I was informed he represented Mr. Boyd.

Q. Thomas McKie, 4,717 shares?

A. I only know from hearsay that he represented Mr. Semmer, Mr. Semmer told me himself.

By Mr. BLANC: I move to strike out any testimony of course that is hearsay, testimony of this character.

320 Q. You were the president of the company, and it was your duty to know who the subscribers were, and what the assets of the company were?

A. Yes, sir.

Q. Do you know, sir, as president, during all the time that you were president, that the people whose names are mentioned on this charter were under any contract liability with the company as shareholders?

A. I don't know that they were; I never knew of them being under any contract liability.

Q. I now also call your attention to Defendants' Exhibit No. 8, being a certified copy of the proceedings of stockholders who voted on the issue of bonds, and containing a list of the stockholders—alleged stockholders—verified by the oath of George Cowen, and ask you, from your knowledge as the president of that company, whether at that time the people named in there as shareholders were under contract of subscription with the company, or whether at that time the stock was in the company's possession, to the credit of those men.

A. I don't know whether I get your exact question.

Q. What I want to know is whether or not at the time these people actually were the subscribers of the stock, or somebody else held the stock.

A. Well, the stock appeared in their names at this time on the books of the company.

Q. Apart from appearing in their name, what were the facts; were they *bona fide* stockholders of the company at that time, as therein represented?

A. Well, I do not know as I can answer that; all I can say is that their names appeared as holders of the stock, subscribers for the stock on the books of the company, but whether they were *bona fide* holders, I couldn't answer that.

Q. Did you ever receive any money from them as an officer of the company, or know of any money being paid directly by those persons to the company?

A. No, sir.

321 Q. Was any pretense made by you as an officer of the company to collect and force that contract of subscription against these gentlemen?

A. No, sir.

Q. Don't you know, in point of fact, that the bulk of those names there were not *bona fide* subscribers, but were representatives of either A. C. Boyd & Co. or A. C. Boyd, Philip Semmer, or George Cowen?

A. I always understood they were representatives of those people.

Q. And you understood it from them?

A. Yes, sir.

Q. I hand to you a pass book of the Farmers' and Miners' Deposit Bank of P. S. Poole & Son, Irwin, Pa., being in account with the Pennsylvania Plate Glass Company, George Cowen, treasurer, and being marked Defendants' New York Exhibit B, H. D. Gamble, examiner, and ask you if you recognize that book?

A. I do.

Q. Will you turn your attention to the first charge against your company on the deposit? How much is that and what is the date?

A. July 22, $100,000.

Q. Do you recollect who signed that check, who was the maker of that check, or was it money, cash that was deposited?

A. It was checks; I don't remember who were the makers of the checks.

Q. Was it cash; did you get the money?

A. We didn't get the money.

Q. How was it deposited? I now call your attention to Defendants' Exhibit 67, H. D. Gamble, examiner.

A. It was drawn out in one check issued for $100,000.

Q. And no money passed either way?

A. No.

Q. And that was payable to whom?

A. A. C. Boyd & Co.

Q. You cannot recollect who were the makers of the checks which represented the deposit?

A. No, I cannot recollect them.

Q. Who made that deposit?

A. Mr. George C. Cowen.

Q. What was said at the time of making that deposit?

A. I don't think I could tell you what was said; it was a good while ago.

322 Q. Was there any explanation made by Mr. Cowen?

A. I remember him saying that he wanted to make the entry and have the bank book started; I remember that.

Q. For the purpose of complying with the law?

A. Yes, sir, for the purpose of complying with the law.

Q. You were connected with the Irwin Land Company, were you not, and with the Irwin Natural Gas Company and Irwin Water Company?

A. Yes, sir.

Q. You made a conveyance to Mr. Cowen and Mr. Semmer of the land upon which the plant was subsequently erected, did you not?

A. I did.

Q. Just tell us as fully as you can when you first met Mr. Semmer and Mr. Cowen, and all about the project resulting in the execution of that deed?

A. I first met Mr. Semmer, I think, about the latter part of January, 1890. I had this land, and I heard that he wanted to locate the works, and I came to New York and met him here the first time, and we talked it over and I made a proposal to give so much land if they would erect the works, and we had quite a little correspondence about it, and finally he and Mr. Cowen came out to look at the location.

Q. Can you fix that date?

A. Well, I cannot exactly; it was along in April or May, probably in May—I rather think in May.

Q. Of 1890?

A. Yes. It was early in the year 1890; and after they had looked it over I gave them a contract for the land and finally gave them a deed for it.

Q. Well, before you gave them a contract, and when they were looking the matter over, was there anything said by either of those

gentlemen as to A. C. Boyd & Co., or some firm to be formed to erect those works?

A. Not to my knowledge.

Q. You didn't know it then?

A. Didn't know it then.

Q. I now hand to you and call your attention to Defendants' Exhibit No. 56, H. D. Gamble, examiner, bearing date the 10th
323 day of June, 1890, the parties being the parties of the first part, purporting to be C. W. Poole and Louise L., his wife, and the parties of the second part being George Cowen and Philip Semmer, both of the city of New York, and ask you if you recognize that paper and those signatures?

A. I do.

Q. And is that the instrument by which this land was turned over?

A. Yes, sir.

Q. Calling your attention to the covenant on their part about the erection of a forty-pot plate-glass works, was it or was it not then understood that such works would be constructed?

A. It was distinctly understood.

Q. Was there any information given to you at that time that Mr. Cowen was not interested in the transaction?

A. No, sir; no information that he was not interested; I always considered him interested.

Q. Well, he took this paper?

A. He took that paper; yes, sir.

Q. The Irwin Natural Gas Company was an independent corporation from the Irwin Land Company, wasn't it?

A. Yes, sir.

Q. But controlled by the same parties principally?

A. No, not entirely.

Q. I am speaking about the control?

A. The control of the Irwin natural gas, it was not controlled by the same parties; the parties were not the same as the parties interested in the land company.

Q. Well, how about the water company?

A. Neither was the water company controlled by the same people.

Q. What was the arrangement about supplying the natural gas and the water?

A. Before entering into the contract with Semmer and Cowen I had a contract with the gas company—I was a director of the gas company, and I had a contract with them to supply the gas for a certain number of years for this glass works, as an inducement to bring it to the town.

324 Q. And you were president of that Irwin Natural Gas Company?

A. Yes, sir.

Q. I now hand you Defendants' Exhibit 65, H. D. Gamble, examiner, and ask you whether that is your signature and the agreement for the natural gas?

A. That is the agreement, and that is my signature, as president of the gas company.

Q. You were the president also, were you not, of the water company?

A. I think not.

Q. Who was?

A. I ain't certain whether it was John F. Wolf or Mr. Simms of Philadelphia; I don't know now.

Q. Murray Forbes was the secretary, was he not?

A. He was superintendent and secretary.

Q. Do you recollect, sir, what you were to pay—you took the contract?

A. I took the contract in my name from the water company.

Q. For what length of time?

A. I think it was five years, although I wouldn't be certain; I would have to refresh my memory on that, but that is my recollection now.

Q. You turned them over subsequently to whom, to Semmer or to the company?

A. I think I turned them over to Semmer.

Q. Under what arrangement with Semmer?

A. Under an arrangement that the water was to be supplied to the glass works, the glass works to be erected on this property, that the water for the purpose of the glass works was to be supplied.

Q. Was he to pay anything?

A. I think he was; I think he was to pay a thousand dollars a year.

Q. Do you know whether that afterwards passed over to the ownership of the Pennsylvania Plate Glass Company?

A. It did.

Q. Upon what terms?

A. That the glass company would have the water free.

Q. Did the natural-gas contract go over to the Pennsylvania Plate Glass Company?

A. It did.

325 Q. From Semmer?

A. Yes, sir.

Q. Upon what terms?

A. On the same terms—that they were to have it free.

Q. You say you acquired your stock, the one hundred shares. The par value was what?

A. The par value was $10,000.

Q. How many shares did you actually purchase?

A. I actually purchased from the company one share.

Q. And how many shares from the others?

A. Ninety-nine shares.

Q. And you bought them, you say, from A. C. Boyd & Co.?

A. Bought and paid for them to A. C. Boyd & Co.

Q. How did you pay A. C. Boyd & Co.?

A. I paid them with my note for—I don't know how long—prob-

ably three months. I didn't have the money and they took my note, and my note came due and I paid it.

Q. You, as president, came under salary, did you not?

A. Yes, sir.

Q. How much?

A. $4,000 a year.

Q. Did you not make the payment of that note out of your salary?

A. I don't think so; I paid the note before I would have enough salary to do it.

Q. How much did you pay for the stock?

(Objected to as immaterial.)

A. I paid 50 cents on the dollar.

Q. So that for that $10,000 you were really paying but $5,000?

A. That is what I paid.

Q. And you paid $100 in cash?

A. Yes, sir.

Q. And you say you paid that to the company?

A. I paid that to the company. I paid $100 in on the organization, and of course I got credit for one share of stock.

Q. Who did you pay that $100 to at the organization?

A. I paid it to George Cowen.

Q. I now show you Defendants' Exhibit D, H. D. Gamble, examiner, and Defendants' New York Exhibit E, H. D. Gamble,
326 being the two treasurers' reports of Mr. Cowen, recognized by him in his testimony, and ask you whether these reports were examined by you as president.

A. I suppose they were; I think they were.

Q. Were you advised of the estimate of the probable cost of the works to the contractors?

A. No, sir.

Q. I hand you Defendants' Exhibit No. 11, H. D. Gamble, and ask you if you recognize this paper as the contract between A. C. Boyd & Co. and the Pennsylvania Plate Glass Company, and your signature as president and the seal.

A. This is the contract and I recognize my signature as president.

Q. What is the date of that contract?

A. 30th day of August, 1890.

—. That contract bears the same date as the first meeting for the organization of the company, does it not? Do you recognize Defendants' Exhibit No. 1, H. D. Gamble, examiner, as the minute book of the company?

A. I do.

Q. Look at the date of the first meeting.

A. August 30, 1890.

Q. That is the same date as this contract?

A. Yes, sir.

Q. I now hand you again Defendants' Exhibit No. 11, H. D. Gamble, examiner, and call your attention to the receipt on the first

page, of $150,000 of the stock received by A. C. Boyd & Co., under date of August 30, 1890. Do you recognize that receipt?

A. Yes, sir.

Q. This contract called for a payment to be made when the deeds and contracts and improvements were turned over. Were those turned over on the day of the date of this contract?

A. I cannot tell you that.

Q. You have no recollection of it?

A. I have no recollection of it; whether they were actually turned over I cannot tell you.

Q. Was a deed ever turned over to the company?

A. A deed for the land?

Q. Yes; by Philip Semmer or George Cowen, or either of
327 them, or both?

A. I don't remember. As I understand your question, you asked me the deed from Cowen and Semmer.

Q. Yes, sir, of the land upon which they were erected, the works, I ask you as president of this company, being the land described in Defendants' Exhibit 66.

A. Oh, I think there was.

Q. Did you ever see it?

A. I don't remember of seeing it.

Q. Do you know whether it was ever recorded?

A. I don't know that.

Q. Was it ever delivered to you as the president of the company?

A. I cannot tell you that now; I haven't got it.

Q. Do you recognize this book Defendants' Exhibit No. 5 as the common stock book of the company?

A. Yes, sir.

Q. Now, certificate No. 1, for 1,500 shares, $150,000, was issued to A. C. Boyd & Co., of Irwin, Pennsylvania, August 30, 1890. Please state in whose handwriting is that receipt, the signature purporting to be A. C. Boyd & Co., per B.?

A. It is in Boyd's handwriting.

Q. And I call your attention to the certificate itself, bearing the name of C. W. Poole, president, and George Cowen, treasurer. Whose signatures are those?

A. My signature as president and George Cowen as treasurer.

By Mr. SCHOYER: I offer that certificate in connection with the testimony of the witness.

Q. Now, it is not true that this certificate for $150,000, 1,500 shares, was immediately distributed to A. C. Boyd & Co., and others, in smaller amounts, including one share to yourself, and I call your attention to certificate No. 40 for one share, issued to C. W. Poole, under date of August 30, 1890, purporting to be receipted for by C. W. Poole, as appears in Defendants' Exhibit No. 5, and ask you whether you received that certificate, and whether that is
328 your signature.

A. I received the certificate, and that is my signature.

Q. And that is the one you paid that $100 for?
A. Yes, sir.
Q. Now, did you not pay that to A. C. Boyd & Co.?
A. I cannot recollect exactly.
Q. Did you in point of fact ever purchase and pay for to the company itself any shares of stock, and is it not true that your transactions were entirely in respect to the stock of A. C. Boyd & Co.?
A. My recollection is that I gave my check on the organization of the company for $100, and afterwards one share was issued to me, and I paid A. C. Boyd & Co. for the balance of the stock.
Q. Did you happen to observe, Mr. Poole, that these 1,500 shares were returned without any transfer on the books?
A. No, I didn't notice it.
Q. Well, see it now?
A. I didn't observe it; I observe it now.
Q. At the time you made this arrangement for the land, did you or did you not understand from Mr. Semmer and Mr. Cowen, or either or both, or Mr. Boyd, that a company was to be formed for the purpose of purchasing that plant from the builders?
A. I understood that.
Q. Did you understand what the proposed terms were to be?
A. Well, I understood that there was—that it was at a fixed price, it was to be built and turned over to the company at a fixed price, $850,000.
Q. As president of the company, at the time you executed this contract, did you have any estimate of the probable cost of the proposed plant?
A. No, sir; I was not in the business; I didn't have any idea.
Q. Was any estimate submitted to the board of directors by A. C. Boyd & Co. within your knowledge?
A. Not to my knowledge.
Q. Did you have any knowledge of a prospectus inviting a builders' loan of $80,000?
A. Not at that time.
329 Q. When did you first acquire that knowledge?
A. About a year afterwards I seen it.

By Mr. BLANC:

Q. A year after what?
A. It was along about the time that the plant was turned over to the company, and I don't remember who gave it to me, but I happened to see it and I was very much surprised when I saw it.

By Mr. SCHOYER:

Q. Would you recognize it if you saw it again, do you think? I call your attention to Defendants' Exhibit No. 104, H. D. Gamble, examiner, and ask you to state whether that is the paper you saw.
A. I seen a paper just like that, and I suppose that is the paper.
Q. I now call your attention to Defendants' Exhibit No. 63, purporting to be a bond from Philip Semmer to C. W. Poole, bearing

the date the 13th day of June, 1890, and ask you if you recognize the signature of Philip Semmer, attested by Livingston Norman?

A. I do.

Q. And was that bond delivered to you?

A. It was.

Q. I now hand to you Defendants' New York Exhibit G, H. D. Gamble, and ask you whether you recognize the signatures to that paper—just name those that you recognize?

A. George Cowen, A. C. Boyd, A. Livingston Norman and J. G. Beamer.

Q. As president of the company were you familiar with the books of the company? Would you know them and be able to identify them?

A. I think so.

Q. I wish you would turn and look at this pile of books, and looking at the exhibit numbers, and tell us if you identify them?

A. I recognize Defendants' Exhibit No. 5, H. D. Gamble, as the certificate book; also Defendants' Exhibit No. 6; also Defendants' Exhibit No. 2, H. D. Gamble, examiner, as the stock ledger; also Exhibit 75 as the index; also Defendants' Exhibit No. 40 as the cash book, and Defendants' Exhibit No. 73, H. D. Gamble, as the ledger.

330 Q. And the minute book you already identified?

A. I think so.

Q. Where was the stock ledger kept?

A. In New York.

Q. And by whom?

A. George Cowen.

Q. Did your company have a bond book, within your knowledge, reciting the issue of bonds, the sales of the Pennsylvania Plate Glass Company?

A. The bond book, I never seen any.

Q. Don't you know that from time to time accommodation notes of the Pennsylvania Plate Glass Company were given to A. C. Boyd & Co. to enable them to raise money?

A. Yes, sir.

Q. Don't you know also that payments on issues of stock money and bonds were made in advance of the time called for in the contract to A. C. Boyd & Co.?

A. I think so; that is my recollection that there was.

Q. Is it not true that the project of the corporation was the scheme or device of A. C. Boyd & Co., meaning thereby Cowen, Semmer and Boyd, as part of the plan to build the plate-glass works, and find a purchase- therefor?

By Mr. BLANC: I object to the form of the question because it assumed that Mr. Cowen was a member of the firm of A. C. Boyd & Co.

A. I can only speak for Mr. Semmer and Mr. Boyd, as the members of A. C. Boyd & Co., from my own knowledge. I don't know that Mr. Cowen was a member of that firm.

Q. Who approached you to become a shareholder or promoter?
A. A Mr. Semmer and Mr. Boyd.
Q. What did they say to you?
A. Well, they held out as an inducement the great profit, and the good it would do the town, and the big profit there would be in it, and that it would be a very profitable thing to go into it.
Q. Was that before or after the deed which you made to Cowen and Semmer?
331 A. That was before the deed. I think I talked to Mr. Cowen then as an individual, and he held out the same inducements.
Q. That is, you didn't know whether he was actually a partner of that firm or not?
A. No, I didn't know.
Q. But you talked to him of the matter?
A. I talked with him, yes, sir, that is right.
Q. Do you know how long after August 30th it was before these works were completed and in full running order?
A. It was some time early in the next year that we made the first glass; probably in June or July.
Q. Well, I am talking about the actual completion of the works for full working, not partial running.
A. They weren't completed until after that; I couldn't tell the exact time.
Q. The contract was based upon a plant capable of producing a million and a quarter feet of plate glass, polished glass, in a year?
A. Either a million or a million and a quarter; I think it was a million.
Q. During your time as president was such production ever reached?
A. No, sir.
Q. Who managed the affairs of the company, in point of fact, from its organization until the works were fully completed?
A. Mr. Semmer and Mr. Cowen.
Q. And Mr. Boyd?
A. And Mr. Boyd, yes, sir.
Q. Do you know why it was that their names did not appear as shareholders and projectors—promotors of this company?
A. Because Mr. Semmer and Mr. Boyd were the contracting firm as I understood it.
Q. And that disqualified them, was that it?

By Mr. BLANC: Objected to as calling for a conclusion.

A. I didn't say that.
Q. That was the reason given, wasn't it?
A. Yes, that was the understanding.
Q. When did Mr. Boyd actually become the superintendent?
A. Well, he was the first superintendent, but I cannot give the date of his election as superintendent.
332 Q. But it was some time after this contract was entered into?

A. Oh, yes, sir; some time afterward.
Q. Was he superintendent when he made the first run of glass in July, 1891?
A. I cannot tell you that; I cannot tell you the date of his election, I don't remember it.
Q. Was there any superintendent ahead of him?
A. No.
Q. Don't you know that that was kept vacant, that office, until Mr. Boyd could be relieved of his position as contractor?
A. Yes, sir; it was kept vacant.
Q. Who succeeded you as president?
A. Mr. Adams, I think, of Philadelphia.
Q. C. H. Adams?
A. Yes, sir.
Q. Who was the first vice-president at that time?
A. Mr. Beamer, I think.
Q. And who the second?
A. Klopfer.
Q. Wasn't it Casey?
A. Casey, yes, sir.
Q. Mr. Cowan continued to be treasurer from the beginning until the end, did he not?
A. So far as I know, until my end.
Q. And he was also a member of the board of directors?
A. Latterly I think he was.

(The examination of this witness was at this point suspended, in order that Mr. William T. Woods might be examined.)

333 *Testimony of William T. Woods.*

WILLIAM T. WOODS, called as a witness on behalf of the defendants, being duly sworn and examined, testified as follows:

By Mr. SCHOYER:

Q. Are you connected with the Lloyds Plate Glass Insurance Company?
A. I am, sir.
Q. In what position?
A. President.
Q. Do you know Mr. James G. Beamer?
A. I do.
Q. Did he at any time occupy an official position in that company?
A. He was president of the company, my predecessor.
Q. How long had he been in that capacity before you succeeded him?
A. Some years.
Q. And when did you succeed him?
A. 1893.
Q. Before you were elected president what was your position?
A. Secretary.

Q. And you had been for some years?
A. Yes, sir.
Q. Do you recollect the circumstance of the sale of some bonds in the Pennsylvania Plate Glass Company to the Lloyds Plate Glass Insurance Company—your company?
A. I know that we purchased some bonds.
Q. How many?
A. $10,000 worth, I believe.
Q. And through whom was the purchase made?
A. The bonds were purchased by a resolution of the finance committee.
Q. From whom?
A. The president obtained the bonds for the committee in accordance with the resolutions, or at their request.
Q. What price did you pay for those bonds?

(Objected to as irrelevant and immaterial.)

A. Par and interest, I believe.
Q. How did you pay for it, by check or cash?
A. Check.
Q. To whom was that check made payable?
334 A. My memory now is that the check was drawn to the order of Boyd & Co.
Q. A. C. Boyd & Co.?
A. Well, whatever the title of the firm was; if it was A. C. Boyd & Co., I presume that was it.
Q. Did you have occasion to see the check after it had been drawn and paid?
A. Yes, sir.
Q. Do you know where that check now is?
A. I do not.
Q. Was there a call for that check subsequently, during the continuance of Mr. Beamer's presidency of that company?
A. I think there was.
Q. Did you find it?
A. No, sir.
Q. It was missing from the place where it would usually be kept?

(Objected to as immaterial and irrelevant.)

A. It wasn't found.
Q. Did that transaction of bonds become a matter of investigation by the Lloyds Plate Glass Insurance Company and Mr. Beamer at any subsequent time?

(Objected to as immaterial and irrelevant.)

By the WITNESS: I assume the commissioner acts as referee here and has the same power as a referee?

By Examiner GAMBLE: As the examiner I have no authority to pass upon the competency of testimony, or tell the witnesses to testify, or direct them to testify, or answer questions.

By Mr. BLANC: I move to strike from the record the conversation between this witness and the examiner.

By Mr. SCHOYER: I object to it.

Q. (Question read.) Did that transaction of bonds become a matter of investigation by the Lloyds Plate Glass Insurance Company and Mr. Beamer at any subsequent time?

A. I do not see that I am called upon to go into any of the details or what occurred in the Lloyds Plate Glass Insurance Company in this matter.

335 Q. (Question read to witness.) I think you will have to answer.

By Mr. BLANC: I object to the counsel instructing the witness. He can answer as he sees fit, or not at all.

By the WITNESS: I decline to answer.

By Mr. SCHOYER: I then ask the special examiner to direct the question to be answered.

By Mr. BLANC: I say that the special examiner hasn't any power to direct the witness to answer, but I also want to state that the counsel for the plaintiff is in no way the counsel for the witness.

By Examiner GAMBLE: The examiner will certify this question to the court to have the court determine whether or not the witness shall be compelled to answer the question.

Q. Do you decline to answer because it would incriminate you or your company in any way?

A. Not at all I decline to answer on the ground that I don't see why we should relate what takes place in the Lloyds Plate Glass Insurance Company, or the meetings of its board of directors in this matter.

Q. The question that I ask you, you will observe is whether or not an investigation had been held. I haven't asked you what transpired.

A. I will answer it by saying that there was some inquiry made about the bonds.

Q. Was Mr. Beamer present during that investigation or inquiry?

A. He was.

Q. Is it not true that during the progress of that investigation or inquiry Mr. Beamer admitted that the bonds which he had sold to your company, being $10,000 worth was part of a purchase of his own from the Pennsylvania Plate Glass Company, or from A. C. Boyd & Co., aggregating $50,000, and that he had purchased those bonds at less than par?

By Mr. BLANC: Objected to as leading and as immaterial and incompetent.

A. I decline to answer this question at present.

336 Q. Not because it would incriminate you or your company?

A. No, sir.

By Examiner GAMBLE: The examiner also certifies this question to the court.

Q. Is it not true that your declination to answer arises from reluctance to give away what you consider the private matters of your company?

(Objected to as an improper question in this case.)

A. Yes, sir.

Q. Did Mr. Beamer resign, or did he fill his full time as president at the time you succeeded him?

A. I decline to answer.

By Examiner GAMBLE: This question is also certified to the court.

Q. What time did you become president?

A. January, 1893.

Q. When are your annual elections held?

A. First Tuesday in February of each year.

Cross-examination by Mr. BLANC:

Q. Those bonds were not bought from the Pennsylvania Plate Glass Company, were they, by your company?

A. I think the company understood that they were.

Q. Who delivered the bonds to you?

A. I couldn't say.

Q. Why did you draw the check to the order of A. C. Boyd & Co.?

A. I didn't draw the check.

Q. Why did your company draw the check to the order of A. C. Boyd & Co.?

A. I couldn't tell you, sir; I presume the cashier was instructed by the president at that time how to draw the check.

Q. What reason have you for saying that you think that those bonds were bought from the Pennsylvania Plate Glass Company? It appears in this testimony that the bonds were all issued to A. C. Boyd & Co. in the beginning. Now, in view of that fact,
337 what reason have you for stating that you presume your company understood that they were bought from the Pennsylvania Plate Glass Company?

By Mr. SCHOYER: Objected to because this witness is speaking of an impression coincident with the date of the transaction, and that he did not at that time have a knowledge of the internal affairs of the Pennsylvania Plate Glass Company, or who got the whole issue, or whether it was upon a sale directly from the treasurer of the company.

A. From the way in which the minutes of the finance committee reads in reference to the purchase of those bonds.

Q. Have you got the minutes of the finance committee here?

A. No, sir.

Q. Can you produce them at any time if it is necessary?

A. I presume if the committee were requested in a proper legal way, they would.

Q. Where are those minutes kept?
A. In the office of the company.
Q. Where is the office of the company?
A. 63 William street.
Q. Were the bonds paid for in full?
A. My recollection is that they were.
Q. Was the check cashed?
A. The check was paid through our bank.

By Mr. BLANC: I make a motion to strike out all of the testimony of this witness as immaterial and irrelevant and not concerning in any way the issues in this action.

Redirect examination by Mr. SCHOYER:

Q. You say you got this information or impression from the minutes of the finance committee. Who constituted the finance committee at that time; was Mr. Beamer one of them as president?
A. He was an *ex officio* member.
Q. What did those minutes disclose to you from which you reached that impression?

Mr. BLANC: I object to that because the minutes would speak for themselves.

338 A. I decline to answer anything about what is in the minutes.

Recross-examination by Mr. BLANC:

Q. When did the company buy these bonds?
A. I could not say from memory.
Q. Have you any idea, was it this year or last year or the year before?
A. Prior to 1893.
Q. Was it subsequent to 1891?
A. I couldn't say, I didn't charge my memory with it.
Q. You don't know whether it was subsequent to 1890, do you?
A. I think it was subsequent to 1890.
Q. I thought you said you didn't charge your memory with it?
A. I didn't with the date. If you ask me the year in which those bonds were purchased I couldn't tell you from memory.
Q. You don't know whether it was subsequent to 1890, do you?
A. I couldn't tell you the date.

C. W. POOLE recalled.

Mr. BLANC: The cross-examination of this witness is subject to the general objection to all the testimony given by Mr. Poole on the general ground of immateriality and incompetency, and also subject to a motion to strike it out.

Cross-examination by Mr. BLANC:

Q. I understand you to say that you were president of the bank in Irwin in 1890?

A. I wasn't the president, I was a member of the firm.
Q. And you had been living in Irwin for some time prior to that time?
A. Since 1877.
Q. You took an interest in the town of Irwin?
A. Yes, sir.
Q. And had business ventures there?
A. Yes, sir.

339 Q. Now, you testified in the examination-in-chief that somewhere in the year 1890 you conceived the idea in connection with other gentlemen to go into the plate-glass business, did you?

A. Yes, sir.
Q. And one of the gentlemen who were going into it with you was Mr. Semmer, I understand you today?
A. Yes, sir.
Q. And you also talked to Mr. Cowen in relation to the matter?
A. Yes, sir.
Q. And in June of that year you made a deed to Mr. Semmer and Mr. Cowen jointly of certain real estate that you owned in Irwin, did you not?
A. Adjoining Irwin; it wasn't in the borough of Irwin.
Q. The real estate upon which the plant in question has been built?
A. Yes, sir.
Q. And that deed is marked Defendants' Exhibit 66, H. D. Gamble, examiner, isn't it?
A. Yes, sir.
Q. This property was your own property when you made that deed?
A. It was.
Q. You deeded this land to Semmer and Cowen for the purpose of erecting and carrying on the glass plant in question, did you not?
A. Yes, sir.
Q. Your idea was that when this property had been taken possession of by these men, and also the contracts with reference to the supplying of water from the water company and to the supplying of gas from the gas company, which had been made to you, that a corporation should be organized for the purpose of conducting the operations of that plant; is that what I understand you to say?
A. Yes, sir.
Q. And that subsequently a corporation was so formed?
A. Yes, sir.
Q. Did you have counsel at the formation of that company?
A. Yes, sir.
Q. And did your counsel advise and instruct you, and the other gentlemen interested with you, in regard to the formation of the company?
A. Yes, sir.

340 Q. And advise you what was legal under the laws of Pennsylvania for the purpose of organizing that company?

A. We went according to their instructions.

Q. And to the best of your knowledge those instructions were correct?

A. Yes, sir.

Q. You are not aware of any irregularity in the organization of this company?

A. No, sir.

Q. So far as you know the object of the other gentlemen who were connected with you, and your own object, of course, was simply to organize this company for the purpose of carrying on this business, on the usual business principles?

A. Yes, sir, that was the object.

Q. Your deed to this land was subject to an agreement on the part of Mr. Philip Semmer that the land should be deeded back to you in case the plant should not be erected in accordance with the understanding?

By Mr. SCHOYER: Objected to because it was subject to a covenant by both Mr. Cowen and Mr. Semmer to return the land.

Q. Well, by Mr. Cowen and Mr. Semmer, if you like?

A. Yes, sir.

Q. And Mr. Philip Semmer made a bond of indemnity to you to that effect conditioned upon that understanding?

A. He did.

Q. Which is Defendants' Exhibit No. 63, H. D. Gamble, in this case, and which has been shown to you by the counsel for the defendants?

A. Yes, sir.

Q. Now, as a matter of fact, this land and these various water and gas contracts were actually turned over to the company which was organized, the Pennsylvania Plate Glass Company?

A. They were.

Q. This deed from yourself to Semmer and Cowen came into the possession, as one of the muniments of title of the Pennsylvania Plate Glass Company, did it not?

A. Yes, sir.

Q. And remained in the possession of that company until you left it?

A. Yes, sir, so far as I know.

341 Q. Of course you understand that I am asking you what you yourself know as president of the company?

A. I gave a deed and it was turned over to the company.

Q. And the land came into the ownership of the company?

A. This paper, it seems to me, was a preliminary contract.

Q. This deed?

A. This deed (Defendants' Exhibit No. 66), and thereafter I made a deed to somebody, but I cannot tell to whom—there was another deed besides. This is not a conveyance of title to the Pennsylvania Plate Glass Company of course.

Q. But you have no doubt it was conveyed to the plate glass company?
A. No doubt.
Q. None in the world?
A. No, sir.
Q. The plate glass company used the property?
A. Yes, sir, and I have no doubt they had the title to it.
Q. The plate-glass plant was built on the property, was it not?
A. Yes, sir.
Q. Now, with reference to the contract for water. That contract for water was turned over by you to the company also, was it not?
A. Yes, sir.
Q. And it was the same in regard to the contract for gas?
A. The same in regard for the contract for gas.
Q. You testified in your examination-in-chief that these contracts cost you an annual—you agreed to pay an annual rental to the water company?
A. To the water company, yes, sir.
Q. And also to the gas company?
A. I don't remember whether the contract with the gas company was drawn—whether they were to pay them or whether they got their gas, it seems to me though that afterwards there was some other arrangements made, but I cannot recollect it.
Q. But at all events whatever rights there were under this contract passed out of you and subsequently into this company, the Pennsylvania Plate Glass Company?

342 By Mr. SCHOYER: Objected to because it is no place in evidence that the water contracts or gas contracts ever passed to Mr. Poole.

Q. You have testified that the water company made a contract with you?
A. Yes, sir, the water company made a contract with me.
Q. And you turned that contract over to this Pennsylvania Plate Glass Company?
A. I don't know whether there was anybody between the Pennsylvania Plate Glass Company, but it eventually went to the Pennsylvania Plate Glass Company.
Q. Through your contract and mesne conveyances, and contracts?
A. Yes, sir.
Q. So that they became the owners of those contracts?
A. Yes, sir.
Q. Did you take any consideration from the Pennsylvania Plate Glass Company for those contracts?
A. Did I?
Q. You personally?
A. No, sir.
Q. No money?
A. No money.
Q. This property you turned over to this company in consideration of the interests which you subsequently had in the stock and

in the company itself, did you not, and that was the only consideration that you received for it?

A. For this contract?

Q. Yes, and for the land.

A. I didn't contribute this for the interest I got in the glass company; I contributed this in order that the glass plant be erected there to enhance the value of the land that I had adjoining; the rest of the land that I had outside of this adjoining; laid out in town lots.

Q. You didn't regard this company as having been overcapitalized, did you; you didn't at the time?

(Objected to as not being cross-examination.)
(Question withdrawn.)

Q. I now show you the original certificate of organization
343 of the Pennsylvania Gas Company, marked Defendants' Exhibit, H. D. Gamble, examiner, which appears to have been verified and sworn to by you. You don't wish to have us understand that anything which is contained in that statement and sworn to by you at that time is false, do you?

A. No, sir.

Q. You are sure that everything in that statement, verified by you, is true?

A. Yes; as I understood it, everything was regular and legal.

Q. You have no doubt that the stock which is there stated to have been subscribed for was subscribed for, have you?

A. I don't have any doubt about it; it was certified to.

Q. You are not able to say now whether or not the actual payments for that stock were made by the persons in whose names it stands on this certificate, are you?

A. I am not able to say they were made now.

Q. And you cannot say whether or not the payments were not made by other persons?

A. I don't know of their having been made to the Pennsylvania Plate Glass Company. The stock was issued on the contract, but as to any cash I have no recollection of anything of that kind.

Q. But you know the stock was issued?

A. I don't know whether all the stock was issued while I was president of the company or not.

Q. You know the stock that is stated here was issued, do you not?

(Objected to.)
(Question withdrawn.)

Q. All the stock that was issued by the Pennsylvania Plate Glass Company was issued in pursuance of the contract with A. C. Boyd & Co., either for cash payments or for property, was it not, this real estate, these contracts and other property?

A. It was issued in pursuance of the contract for cash.

Q. For cash or for other property?

A. Yes, sir.

344 Q. Now, in pursuance of that contract Boyd & Co. proceeded to erect this plant on the property in question?

A. They did.

Q. And they turned it over to the Pennsylvania Plate Glass Company when it was completed?

A. I don't remember when they turned it over; probably in 1891, or some time around there.

Q. About the middle of 1891?

A. Yes, sir; I should think so.

Redirect examination by Mr. SCHOYER:

Q. Do you mean to be understood as saying that a solitary dollar of cash was paid to the Pennsylvania Plate Glass Company for any stock whatever?

A. Oh, yes, I think there was.

Q. And not all through the intermediation of A. C. Boyd & Co. Take your books and point out a solitary dollar of stock that was ever purchased by anybody living from the Pennsylvania Plate Glass Company, who paid cash, except through purchasers, through A. C. Boyd & Co., or from Semmer or from Cowen.

A. Well, the treasurer kept all those accounts.

Q. I don't ask about the treasurer. I ask you to take the books and point out a solitary dollar of stock ever paid for by anybody to the company except through the purchases that were made through Boyd & Co.

A. I think there were some stock paid for through the company.

Q. Well, now, there are your books, point them out.

A. That might be a pretty big job, but I will see if I can find them.

Q. Take your time to do it.

A. I can remember of one cash payment that I understood came for stock.

Q. Well, what was that?

A. That was a check of Mr. Beamer's and another gentleman from New York here that came out there once.

345 Q. And now add to that question, find one solitary share of stock that didn't go to A. C. Boyd & Co., that ever remained in the treasury, except when the board of directors released Wray E. Davis and Daniel Harrison and John A. Norman and McKie?

A. I can tell you one check that went in the company. I paid the company $100 on my stock, and they issued me one share of stock.

Q. Did you pay that to the company, or did you pay that to A. C. Boyd & Co.?

A. I gave a check for 10 per cent., $100.

Q. Who was the payee in that check?

A. I don't know. I know the check was paid.

Q. I ask you under your oath whether you ever paid that to the

company, or whether you didn't pay it to A. C. Boyd & Co., and if you can show me any stock that company ever did sell?

A. I still insist that I paid $100 into the company when the organization of the company was made. I paid $100, and I got a share of stock afterwards.

Q. Did you pay that to the treasurer for the stock, or to A. C. Boyd & Co.?

A. I paid it to the treasurer, and Mr. Klopfer paid his.

Q. How was the check drawn?

A. I cannot say.

Q. And from whom did the stock come except through A. C. Boyd & Co., their 1,500 shares?

A. I don't know how the treasurer managed it, but I know I got a share of stock.

Q. How did you separate the treasurer, George Cowen, from the trustee of A. C. Boyd & Co., or from A. C. Boyd & Co. itself, and whose stock was it you got except A. C. Boyd & Co.'s stock?

A. I know nothing about A. C. Boyd & Co.

Q. I don't deny that you paid your $100, but I ask you to show how you paid that and got the stock from the company, when all the stock had been issued to A. C. Boyd & Co. at the time when you got yours?

By Mr. BLANC: I object to the form of the question as leading and as assuming as facts things that have not been proved in this action.

346 A. All the stock hadn't been issued to A. C. Boyd & Co. at the time I got mine.

Q. I have shown you on direct an issue of 1,500 shares to A. C. Boyd & Co.?

A. Yes, sir.

Q. And that from that your stock came?

A. Well, that wasn't the whole issue of the stock; that was $150,000 worth of stock that was issued.

Q. Show me then in the books how you could have gotten it in any other way than out of that 1,500 shares of stock issued to A. C. Boyd & Co.?

A. I cannot explain it, but I paid my $100, and I got my stock.

Q. That is all you wish to be understood as saying?

A. Yes, sir; I paid my $100 and I got my stock.

Q. Then, so far as on your cross-examination you said you paid that to the company, you don't mean to be understood as saying anything more than that you paid that $100 and got that share?

A. I paid my $100 as ten per cent. of the subscription to George Cowen, and he was the treasurer of the company, and I got one share of stock. I got more stock after that, but I paid A. C. Boyd & Co. for that.

Q. And you don't know but what you got that one share of stock from A. C. Boyd & Co.? If you have any doubt about it look at the stock book.

A. I don't know how they worked it, but I remember that on the

organization I paid $100, being ten per cent. and Mr. Klopper paid his, and the check was paid, and I got my share of the stock.

Q. You have stated on cross-examination that all these papers, the water and natural gas, and other matters, were in the possession of the company. Aren't you mistaken about that, sir?

A. I don't think so; they had their contracts for all these things.

Q. You were president of the company?

A. Yes, sir.

Q. Did you handle those papers?

A. Yes, sir, we had our contracts. As president I say we had the contracts for the gas and water.

347 Q. But you are speaking now of the contract which you made to Mr. Semmer, Mr. Semmer and Mr. Cowen. Do you mean to say that you or that company were in possession of any other papers from Semmer, or from Semmer and Cowen?

A. I am not certain, but I think the gas company finally made the contract direct with the glass company. I have a recollection of that, although the papers will speak for themselves, but however in any event the glass company had their contracts in such shape that they were together with the gas and water companies, but whether they came direct from Semmer, or whether they came from some arrangement made afterward I cannot at present say.

Recross-examination by Mr. BLANC:

Q. You know that the $100 that you paid went into the treasury of the company, do you not?

By Mr. SCHOYER: I object to that, the witness has not testified to anything of the kind.

Q. Did your one hundred dollars go into the treasury of the company that you paid for this share of stock that you have testified to?

A. I paid my $100 to the treasurer of the company, as my ten per cent. of the subscription.

Q. To George Cowen, the treasurer of the company?

A. Yes, sir; to George Cowen.

Q. You were shown in your examination-in-chief a report made by George Cowen, the treasurer, of February 5th, 1891, and which is marked Defendants' Exhibit No. 103, for identification, and also marked Defendants' Exhibit D, H. D. Gamble. Was that report submitted to the board of directors?

A. It was.

Q. And you saw it at the time as president?

A. Certainly.

Q. And were the sums specified there as having been paid into the treasury actually received?

A. I cannot tell you; the treasurer so certified.

348 Q. But you did see that report; it was submitted to the board of directors?

A. Yes; he always submitted his report.

Q. All of the stock that was issued to Boyd & Co. was issued under the contract, was it not?

A. I believe so.

Q. And in consideration for the buildings and construction which they made?

A. Yes, sir.

Q. Or for cash paid by them?

A. Cash paid by them to the company?

Q. Yes.

A. I never recollect them paying any cash for stock.

Q. But for the construction they were?

A. The stocks were issued for the construction.

Q. They were paid for that construction entirely in bonds and stock, as I understand it?

A. No; they got some cash, too.

Q. And some cash, too?

A. Yes, sir.

Q. With the exception of the stock which was issued to Boyd & Co. for that construction, all of the stock issued was issued for cash—whatever stock was issued other than that which was issued to Boyd & Co. was issued for cash?

A. I think so.

By Mr. SCHOYER:

Q. How do you know that?

A. Well, there was some evidence given me by the treasurer that there was value given for the stock, or it wouldn't be issued at the time. I cannot call up the exact circumstance at the present time.

Q. But you have said that all the stock that was not taken by A. C. Boyd & Co. that was sold, was sold for cash?

A. I think so.

Q. That is a conclusion that you arrive at?

A. No; it is no conclusion; I think it is a natural conclusion. The stock wouldn't be issued without some value, or something received for it.

Q. That is not from any knowledge of your own?

349 A. Yes, sir; I have a recollection of some stock being sold for cash.

Q. Whose?

A. I think it was Mr. Beamer's, probably; and Hutkoff or Lezansky.

Q. Now, will you look at the stock book and see from whom the stock of those gentlemen came; see whether they came from the company or somebody else.

A. I can look at the stock book of course, but I don't know whether I can figure it out or not; I am nothing of a book-keeper.

Q. Where did you get your knowledge from?

A. I remember at the time, because it was a rare occurrence that we got any cash, only for goods sold, and I remember the time these gentlemen were out there, and I think there was cash paid,

and I think the bank book will show. Have you got the bank book?

Q. Yes; here is the bank book. Now, then, go right over there to the stock ledger, and find the certificates given those gentlemen and see from whom they got them; whether they got them direct from the treasurer of the company, or from some other surrendered certificates?

(Objected to as immaterial.)

A. I ain't able to follow up that stock book.

Q. Well, the fact is you are only speaking from an impression, without any actual knowledge?

A. I got the impression at that time, and it has never left me. I have some very vivid impressions about the result of that company that I don't and can't forget.

Q. But you have now the books before you and you can testify exactly how that stock did come, and you needn't rely on your impression?

A. I cannot say more than I have said about it; that is my recollection of it; it is so long ago.

Q. But you could say more if you went to the stock book couldn't you?

A. I think if I went to those books I would just say as little, because it would be very hard for me to find out anything about it in those books.

350 Q. Now, look at the stock book, and see the certificate and see from whence that certificate was issued?

A. I tell you right now I don't understand it very well.

By Mr. BLANC: I object to the witness being subjected to any further questions on that point.

Q. If you are testifying from your own knowledge, say that, but if you are testifying only from impressions why say that?

A. So far as my paying my money——

Q. I am only talking about these other stocks, the last ones, whether they were sold by the company or whether they came to these persons that you mentioned, whether they got these stocks through the intermediation of any other person?

A. I cannot tell you that.

By Mr. BLANC:

Q. What you are sure of as president of the company is that no stock was issued by this company except for value?

A. I am sure of that.

Q. That you can swear to?

A. Yes, sir.

*Defendants' Testimony.*

JOSEPH W. STONER recalled.

Direct examination by Mr. SCHOYER:

Q. You have already been sworn in this case?

A. Yes, sir.

Q. You are the receiver, I believe you testified, of the Pennsylvania Plate Glass Company?

A. I am the receiver of the old Pennsylvania Plate Glass Company.

Q. By appointment of what judge?

A. Judge Doty, in the Greensboro Pennsylvania common pleas of Warren county.

Q. As such did you accept the trust?

A. I did.

Q. Are you still receiver?

A. I am.

Q. State whether or not as such receiver the books of the Pennsylvania Plate Glass Company are in your possession.

A. They are.

Q. Will you look at these books and say whether these
351 passed to you as such receiver in pursuance of your trust?

A. They did.

Q. Look at that bank book, and look at the exhibit number inside; what is it?

A. New York's Defendants' Exhibit B, H. D. Gamble.

Q. Now, take up the minute book and give its exhibit number.

A. Defendants' Exhibit No. 1, H. D. Gamble, examiner.

Q. Look at the stock certificate book, and give its exhibit number.

A. Defendants' Exhibit No. 5, H. D. Gamble.

Q. And the stock ledger?

A. Exhibit No. 2. Exhibit No. 73 is the ledger, and this is Exhibit No. 75, the index book to the common ledger, and Exhibit No. 74 is the cash book, and Exhibit No. 4 is the stock ledger, and Exhibit No. 3 is the preferred stock ledger, and Exhibit No. 6 is the preferred stock book.

Q. And the checks that were attached to Defendants' New York Exhibit B, where did they come from?

A. Came also into my possession.

Q. As such receiver?

A. They did.

Q. Who delivered them to you? and also look at Exhibit No. 11, H. D. Gamble.

A. This is the original contract between the gas company and A. C. Boyd & Co. I don't know; the judge of the court ordered them to be delivered to me.

Q. How did you get possession of them?

A. I walked right in the office and took possession of them.

Q. And you found them all in the office?

A. Well, perhaps not just in the office, but they were in close contact with the office; some were in one department of the factory office, and some in the other.

Q. You have already sworn of your own knowledge that these were the books of account?

A. Yes, sir.

Q. Books and papers?

A. Yes, sir.

352 Q. How do they come to be in the possession of the defendant for the purposes of this trial; was it upon notice to you to produce them?

A. Upon notice; they asked to have them brought here for the purpose of presenting them at this trial, but they are in my care yet, although just now they are in Mr. Gamble's care.

Q. They are your books?

A. Yes, as receiver I claim them; personally I cannot, but I can as receiver.

Q. When did you say you became connected with this company as a stockholder?

A. Oh, in February, 1892, I believe; February or March, 1892.

Q. That was your first connection?

A. Yes, sir.

Q. After you became connected with the company who conducted the principal part of its management?

A. Mr. Philip Beamer was president of the company. Mr. Poole was the first president, and then he was succeeded by Mr. Adams as president, and in the latter end of the company, in its declining days, Mr. Semmer was president.

Q. But I am talking about who took practically the chief part in it?

A. Well, the financial end of it was taken care of by Mr. George Cowen.

Q. You know Mr. Beamer?

A. Yes, sir.

Q. Did he take or did he not take an active part in the operations of the company, as manifested by the proceedings in the board meeting-?

A. Well, he attended the board of directors' meetings and occasionally paid a visit to that place without acting in an official capacity as a director.

Q. Do you know, sir, through whose motions the bonds were issued, or stock was issued,—were issued from time to time?

A. No, sir; that was before my identification with the company.

Q. Are you acquainted with the handwriting of Mr. Cowen?

A. I am.

Q. Look at Defendants' Exhibit No. 40, H. D. Gamble, examiner, dated August 9th, 1892, addressed to the Pennsylvania Plate Glass Company, and purporting to be signed by George Cowen, and

353 I ask whose that signature is; whose handwriting?

A. Well, that is George Cowen's signature.

Q. No doubt about that?
A. No.
Q. You have seen Mr. Cowen write?
A. I have.
Q. Have seen his signature often?
A. I have.
Q. And you found that paper among the papers that passed to you?
A. It seems to have been in the multitude of papers that passed into my care. I cannot recollect that one specially.
Q. You were a director of the company?
A. I was part of the time.
Q. Secretary too, were you not?
A. I was.
Q. Do you know anything about tho cancellation of the gas and water contracts?
A. Not officially.
Q. Do you know anything about them except by hearsay?
A. No, sir.

Cross-examination by Mr. BLANC:

Q. You testified that you had seen Mr. George Cowen write very frequently?
A. Yes, sir.
Q. Would it make you doubt that was his signature if you were told that he himself doubts that it is his signature?
A. No, sir, there would be nothing on earth that would make me doubt that was his signature. If all of you gentlemen swore to it I would still say that was his signature.
Q. When were you appointed receiver of the Pennsylvania Plate Glass Company?
A. On the 19th of March, 1894, I believe.
Q. In what suit was that?
A. Well, I don't know; it was an equity suit.
Q. Who was the plaintiff?
A. George Cowen, A. C. Boyd, Philip Semmer, Nathan Hutkoff, R. H. Casey and some other creditors that joined in the voluntary proceedings.
Q. And the only defendant was the Pennsylvania Plate Glass Company?
A. Yes, sir.
354 Q. Are you still in the possession of the property of the Pennsylvania Plate Glass Company as such receiver?
A. No, sir, I am not in possession of the property.
Q. The property has been sold?
A. Yes, by an order of the court.
Q. And you were the referee appointed by that order to sell the property?
A. Yes, sir.
Q. And you did sell it at public auction?

(Objected to as not cross-examination.)

A. Yes, sir.

C. W. POOLE recalled.

C. W. POOLE, recalled on behalf of the defendants.

Direct examination by Mr. SCHOYER:

Q. You said that A. Lazansky bought stock of the company?
A. No, sir; I didn't say that.
Q. Who was it?
A. I said I couldn't say whether it was Mr. Hutkoff or Mr. Lazansky. Mr. Lazansky was out there a couple of times.
Q. You couldn't remember which it was?
A. No.
Q. Will you look at the stock certificate book, certificate No. 103 to Mr. Lazansky, and see from whom he gets it, and then look at Lazansky's account on the stock ledger, Defendants' Exhibit No. 2, page 60, and see from whom he got the stock?
A. I cannot tell it here; you can tell who it was received by, that is all. Yes—there it is; he got it from Mr. Beamer (witness referring to Defendants' Exhibit No. 2, page 60).
Q. Now, do you find it receipted for, the certificate itself in Exhibit No. 5? Look at certificates 103 to 107, both inclusive.
A. Receipted for on the stub, "A. Lazansky by J. G. Beamer."
Q. Do you recognize Mr. Beamer's signature?
A. I do.
Q. On all of them?
A. On all of them.

355 Q. Now, look at the stock issue to Nathan Hutkoff from certificates 77 to 89, both inclusive, in Defendants' Exhibit 5, the stock certificate book, and say who receipted for them.

A. They are receipted for Nathan Hutkoff by J. G. Beamer.
Q. Do you recognize Mr. Beamer's signature?
A. Yes, sir.

*Testimony of Nathan Hutkoff.*

NATHAN HUTKOFF, called as a witness on behalf of defendants, being duly sworn and examined, testified as follows:

Direct examination by Mr. SCHOYER:

Q. You became connected with the Pennsylvania Plate Glass Company as a stockholder?
A. Yes, sir.
Q. In 1890?
A. Something about that.
Q. And at that time you knew Mr. Beamer?
A. Yes, sir.
Q. And it was a matter of consultation between you and him,

that if you went in the company you would go in together, and if you didn't go in he wouldn't?

(Objected to as immaterial.)

A. I don't know that was the reason; I don't think we had any consultation like that.

Q. Didn't you have a consultation before either of you purchased stock?

A. Yes, sir, he purchased stock.

Q. Who did you make your arrangement with about purchasing the stock?

A. Mostly with the treasurer of the company, Mr. George Cowen.

Q. Did you have any talk with Mr. Semmer?

A. Semmer was there sometimes.

Q. Well, about buying the stock?

A. About buying the stock, I had always——

Q. Did you have any talk with Mr. Semmer about buying the stock before you bought it?

A. I talked with Mr. Cowen, and Semmer was present.

Q. I didn't ask about Cowen; did you talk with Semmer?

A. Maybe I did, I didn't say I didn't.

Q. Did you have any arrangement with Semmer that you would have certain terms if you bought the stock?

356 (Objected to as incompetent and immaterial.)

A. No, sir.

Q. Was your arrangement that you were to have it below par?

A. No, I had an arrangement to buy my stock and I bought it and paid for it at par.

Q. And who did you pay it to?

A. To the company.

Q. Whose stock was it you bought?

A. I presume it was the company's, I got the stock.

Q. Did you have any rebate?

A. No.

Q. No discount?

A. No, sir, no discount. I tell you what discount I had. I gave him $5,000 in cash and $5,000 I gave him a note for, for ninety days, and I went to the treasurer and I told him after forty days if you will give me my note back and allow me the interest for forty days I will give you a check for $5,000 and he gave me back the five-thousand-dollar note and the rebate was the interest for forty days.

Q. Don't you remember about November, 1890, arranging with Mr. Semmer that you and Beamer would take stock provided you were to pay for it in the same proportion as Pool and Clopfer had?

(Objected to as immaterial and also as leading.)

A. If I would know that Mr. Poole or anybody else paid less than par I wouldn't pay any more.

Q. I ask you to answer that question.

A. No, sir; I never knew the stock was bought less than par.
Q. You are a bondholder, aren't you?
A. Yes, sir.
Q. When did you acquire the bonds?
A. I bought at public auction.
Q. When?
A. About, pretty near two years ago.
Q. After the receiver's sale?
A. After the receiver's sale.
Q. What did yo- pay for them?

(Objected to as immaterial.)

A. I think I paid 59½.

357 Q. Do you know whether Mr. Beamer bought any last year, the last bonds he bought?

(Objected to on the ground that it calls for hearsay testimony.)

A. I don't know.
Q. When you bought your bonds you knew this suit was in litigation?
A. No, sir.
Q. You did not?
A. No, sir.
Q. Well, what do you know about the time that Mr. Beamer bought his last bonds?

Mr. BLANC: Objected to on the ground that it calls for hearsay.

A. I don't know nothing, if he had bonds or he bought bonds.
Q. You don't know when he got them?
A. No, sir.
Q. Do you know what he paid for his bonds?
A. I don't know.

No cross-examination.
Adjourned to Monday, December 20, 1897, at 10 a. m.

NEW YORK, *December* 20, 1897.

Met pursuant to adjournment.
(Same appearances.)

GEORGE COWEN recalled.

By Mr. BLANC:

The cross-examination on this subject to the general objection and motion to strike out all of the testimony of this witness on the ground of immateriality, and for the same reason that he objected to the testimony of the other witnesses called by the defendants.

Cross-examination by Mr. BLANC:

Q. Did Mr. Kann, the defendant in this action, ever have any official connection with the company—the Pennsylvania Plate Glass Company?

358 (Objected to as not cross-examination.)

A. Yes, sir.
Q. What was that capacity?
A. He was treasurer for a short time, I think.
Q. Subsequent to your incumbancy?
A. Yes, sir.
Q. Do you recollect the date when he became treasurer?
A. No.
Q. Was there a salary connected with the office of treasurer?
A. I don't remember.
Q. Did you draw a salary as treasurer?
A. No, sir.
Q. Do you know whether there was any salary attached to that office?
A. I can't remember.
Q. Did your duties as trustee of Boyd & Co., and as treasurer of the Pennsylvania Plate Glass Company interfere one with the other?

(Objected to as calling for a conclusion.)

A. Not in the slightest.
Q. Did you keep separate accounts of those officers?
A. Yes, sir.
Q. And the moneys which entered into one account had nothing whatever to do with the other account?
A. No, sir.
Q. Nor the moneys that were paid out?
A. No, sir.
Q. You made no advance from one account to the other?
A. No, sir.
Q. You, yourself, personally loaned money to the Pennsylvania Plate Glass Company?
A. Yes, sir.
Q. From time to time?
A. I made them some loans, I don't know how many.
Q. And also to Boyd & Co.?
A. Yes, sir.
Q. For the purpose of carrying out the contract which has been marked Defendants' Exhibit No. 11, H. D. Gamble, examiner?
A. The contract for building the plant.
Q. The contract with A. C. Boyd & Co. for building the plant?
A. Yes, sir.

359 Q. And in return for those loans how were you compensated?

A. I had a deal with Mr. Semmer that some of his stock I bought below par.
Q. You took stock of the Pennsylvania Plate Glass Company in payment of your loans?
A. Yes, sir, from A. C. Boyd & Co., not from the Pennsylvania Plate Glass Company.

Q. How were you repaid for your loans to the Pennsylvania Plate Glass Company?
A. They owe it to me yet.
Q. They still owe it to you?
A. Yes, sir.
Q. Were your loans to Boyd & Co. to any large amount?
A. I cannot remember now.
Q. Now, I show you your account as treasurer of the Pennsylvania Plate Glass Company, marked Defendants' Exhibit D, H. D. Gamble, examiner. All of the entries on the debit side of this account represent receipts by you as treasurer of the Pennsylvania Plate Glass Company?
A. Yes, sir.
Q. Representing either checks or cash paid into your hands as treasurer?
A. Yes, sir.
Q. Were not those moneys deposited by you in the account of the Pennsylvania Plate Glass Company?

By Mr. SCHOYER: Objected to as assuming that the checks were cash.

A. Yes, sir.
Q. All these moneys that came in in the form of checks were deposited likewise?
A. Yes, sir.
Q. And the checks went through the usual course?
A. They were deposited in the bank and credited on my books.
Q. And you drew against those checks?
A. Yes, sir.
Q. Now, you have been asked about certain papers and accounts and books which you had at one time in connection with your office, as treasurer of the Pennsylvania Plate Glass Company. When you ceased to be treasurer did you not turn over all the papers and books as treasurer of the company?

360 By Mr. SCHOYER: Objected to, as the witness has already stated he didn't know whether he kept any books or what has become of them.

A. Why, I cannot answer that anyhow. I know I had the certificate book and that was returned and the treasurer's stock book that I see is there, so that must have been returned.
Q. It isn't likely that you would keep any of the books belonging to this company after you had ceased to have official connection with the company, is it?
A. No, sir, I don't know what other books I had.
Q. All of the $250,000 in bonds that were issued by this company, you have testified were received by A. C. Boyd & Co.?
A. They were delivered to me.
Q. To you as treasurer?
A. Yes, sir; and I paid them out to A. C. Boyd & Co.
Q. Upon orders of the president and board of directors?

A. Board of directors.
Q. In accordance with their resolution?
A. Yes, sir.
Q. They were not all turned out at one and the same time?
A. No, sir; according as I received the orders.
Q. For what reason were these bonds all paid to A. C. Boyd & Co—in payment of what?
A. In payment of the construction of the plant.
Q. As part of the purchase price under that contract?
A. Yes, sir.
Q. The contract called for payments in cash and stock but it was also true that bonds had been issued in part payment in lieu of stock for that amount?
A. I don't remember; there was a change there where we changed from cash to bonds.
Q. So that these bonds were taken in lieu of cash to that amount by Boyd & Co.?
A. Yes, sir.
Q. But that was in payment of the plant?
A. Yes, sir.
361 Q. Boyd & Co. performed the work they were required to by the contract in building the plant?
A. Yes, sir.
Q. And they turned over the plant to the company?
A. Yes, sir.
Q. And received the bonds in part payment thereof?
A. Yes, sir.
Q. Now, I call your attention to pages 155 and 156, Defendants' Exhibit No. 1, H. D. Gamble, being the minute book of the Pennsylvania Plate Glass Company, and call your attention to the minutes of the regular meeting held on the 14th of February, 1894. Were you present at that meeting?
A. I cannot remember that.
Q. Is it not a fact that at that meeting of the board of directors the salary for the officers dating from the first of February of that year were fixed?

Mr SCHOYER: Objected to as outside of the issues in this action, and that the minutes will speak for themselves.

Q. A. Yes, sir.
Q. Do you see among the salaries so fixed a salary for W. L. Kann, treasurer, $3,000?
A. Yes, sir.
Q. Do you remember the dates upon which the various amounts of bonds were paid to Boyd & Co.?
A. I do not, sir.
Q. Do you recollect about how long a period of time they ranged over before the entire $250,000 were issued?
A. Why, about the time they took to complete the plant; I don't know whether that was a year or not.

Q. All of the bonds were issued prior to the time when the plant was completed?

A. I cannot remember.

Q. I call your attention once more to your report as treasurer, marked Defendants' New York Exhibit D, H. D. Gamble, examiner. It appears on that account that prior to February, 1891, that $75,000 of the bonds had been delivered to A. C. Boyd & Co.; is that correct?

A. January, 1891, I had $250,000 worth of bonds and subsequent to that I gave A. C. Boyd & Co. $75,000, and that was before February 5th.

362 Q. Up to February 5th you had delivered only $75,000 of bonds to A. C. Boyd & Co.?

A. Yes, sir.

Q. Now, I call your attention to Defendants' New York Exhibit E, H. D. Gamble, examiner, and ask you whether the statement on that exhibit that $30,000 of the bonds in addition to the $75,000 already delivered were delivered to A. C. Boyd & Co. prior to the 1st day of April, 1891?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. That was the second delivery of bonds to A. C. Boyd & Co.?

A. That is the second delivery; yes, sir.

Q. So that it appears that only $105,000 of these bonds had been actually issued to A. C. Boyd & Co. prior to the 1st day of April, 1891?

A. Yes, sir.

Q. The remaining bonds were issued to them subsequent to that day?

A. Yes, sir.

Q. Was any cash paid to A. C. Boyd & Co. under the contract marked Defendants' Exhibit No. 11?

(Objected to as not cross-examination and as irrelevant.)

A. I ain't positive; I believe there was.

Q. In the sixth paragraph of the contract the provision for payment is contained, and in that paragraph it is provided that $100,000 in cash, and $150,000 in stock, should be paid on the delivery of the deeds, contracts, franchise, etc. Was that done?

A. I can only state that from the book here. The treasurer's book shows that $150,000 worth of stock was delivered, and from that check book the $100,000 check was delivered.

Q. Which check book?

A. Well, the bank book.

Q. The bank book marked Defendants' New York Exhibit B?

A. Yes, sir.

Q. It appears from that book that $100,000 in cash was drawn against that account to the order of A. C. Boyd & Co.?

A. Yes, sir.

Q. I show you Defendants' New York Exhibit C, H. D.
363 Gamble, examiner, and ask you if that is the check to which you refer?

A. I believe that is the check.

Q. That check is signed by you as treasurer?

A. Yes, sir.

Q. And it is to the order of A. C. Boyd & Co. for $100,000?

A. Yes, sir.

Q. Dated August 30th, 1890?

A. Yes, sir.

Q. How is that check endorsed?

A. A. C. Boyd & Co., George Cowen, attorney.

Q. You endorsed that check as trustee for A. C. Boyd & Co. under the arrangement which you testified you had with them?

A. Yes, sir.

Redirect examination by Mr. SCHOYER:

Q. Your attention was called to Defendants' New York Exhibit D, H. D. Gamble, being your first account, and you have stated that on this,—your receipts here were moneys which came into your hands and which you deposited, and for which you had an account. Do you mean by that that they were actual moneys or checks?

A. Checks for moneys.

Q. And when you deposited these various sums of money or these checks, were you of your own knowledge aware that it was money, or that it called for money?

A. It called for money.

Q. That was all?

A. Yes, sir, they weren't certified, I don't believe, and I treated them just as I would treat any check.

Q. As for instance, August 30th, A. L. Norman, $1,000, which seems to have been received by you. Don't you know that Mr. Norman didn't pay $1,000, but wiped out his stock to that amount by services?

(Objected to as immaterial and incompetent.)

A. I heard him testify here so, but I don't remember though whether I didn't give him a check for his payment, and then he gave me a check for deposit.

364 Q. But wasn't that transaction a long time after August 30, 1890? Don't you know that it appears that that transaction was January 7, 1891, on the motion of Mr. Beamer, that Mr. Norman be paid $700 for services, as attorney for the company from the date of the incorporation to February 1st, 1891, and that thereafter he should be paid at the rate of $1,500 per annum up to the end of the corporate year, and that his stock was paid for out of those compensations, and also from the fact that a voucher was drawn May 1st, 1892, by A. C. Boyd & Co. to A. Livingstone Norman, in favor of A. Livingston Norman, for professional services in full to date, twenty-five shares P. P. G. Co. stock, $2,500, and mailed to you their voucher on May 12th, 1892, in a letter by A. C. Boyd & Co.?

By Mr. BLANC: Objected to as immaterial and incompetent, and that it is leading, and that it recites the contents of letters that speak for themselves, and which have not been proven.

A. That may be. A. C. Boyd & Co. had a right to tell me what to do with their stock, and whether they had anything to do with Mr. Norman's services to the P. P. G. Co., I don't know.

Q. The point is, was this $1,000 paid to you in cash? Do you know that it was paid in cash, or was it a mere check?

A. It was a check.

Q. You are sure of that?

A. Quite positive.

Q. That there was a check?

A. I don't remember now.

Q. Do you mean to say, sir, that this treasurer's account which you have identified as being correct and made by you, Defendants' New York Exhibit D, is correct when it states that C. W. Poole, on the third day of January, 1891, had given you money for $9,900?

A. I must have gotten a check.

365 Q. Why do you say you must have gotten a check if you can't remember?

A. I can't remember, no, sir; I can't remember now, but simply from the fact that it is down there.

Q. Why then do you say that you must have gotten a check?

A. I know I wouldn't have made the entry if I didn't get a check.

Q. You said you kept no account, no books, bond books of A. C. Boyd & Co.?

(Objected to.)

Q. No account of your own to show your dealings with A. C. Boyd & Co. except the stock book?

A. I kept the cash book of A. C. Boyd & Co.'s.

Q. Where is that?

A. I can't find that with the other papers. A. C. Boyd & Co.'s cash was given to me and I deposited it in the various banks.

Q. You heard Mr. Poole's testimony, didn't you, in which he said that he gave notes for that amount for 50 per cent. of that amount to A. C. Boyd & Co.?

A. No, sir; I didn't hear it.

Q. Don't you know that he did?

A. No, sir; positively not.

Q. Well, assuming that he gave notes for 50 per cent. of the stock to A. C. Boyd & Co., how do you get this into your account as treasurer for $9,900 of the Pennsylvania Plate Glass Company?

A. That I cannot tell; I must have got it somewhere. That is the first that I heard that Mr. Poole gave notes for his stock.

Q. Assuming that Mr. F. Y. Klopfer gave a check for $4,900, which was immediately returned to him on the same day, how do you account for putting Klopfer down as paying $4,900 in cash?

(Objected to as immaterial.)

A. I don't remember giving Mr. Klopfer back $4,900 and I don't think I did.

Q. How much did you give him back?

A. Nothing.

366 Q. Did you ever have his check?

A. I believe I did.

Q. Do you remember having seen his check?

A. No, sir, except from the entry, that is the only thing that recalls it to me.

Q. Did you receive a check on January 7th from J. C. Beamer for $10,000?

A. I cannot recollect that.

Q. On the 30th of August here is this check of $100,000 to A. C. Boyd & Co., and on the same date, August 30th, 1890, it appears by the stock book, certificate No. 1, August 30th, 1890, that there were 1,500 shares, amounting to $150,000 directed by the company to A. C. Boyd & Co., and receipted by A. C. Boyd & Co. How do you explain that issue of stock to A. C. Boyd & Co. on August 30, 1890, in lieu of this certificate for charter which shows all the stock to have been subscribed for by others?

By Mr. BLANC: Objected to as immaterial and also because it isn't a proper question on redirect examination, as I have asked this witness nothing about the issue of stock.

A. Why, I received instructions from the Pennsylvania Plate Glass Company to issue that stock, and I issued it.

Q. Where are those instructions?

A. In the minute book.

Q. Here are the minutes of August 30, 1890, as appear upon page 1 to page 17 inclusive, in Defendants' Exhibit No. 1, H. D. Gamble, examiner, and I ask you to point out the authority to issue $150,000 worth, 1,500 shares on the 30th of August, 1890, to A. C. Boyd & Co.?

A. When I said the minute book I may have been a little hasty; I meant it was because the contract calls for that; I don't believe it is in here.

Q. Find in there, if you can, any authority to you to give $100,000 on August 30, 1890, to A. C. Boyd & Co., for which you issued a check for $100,000?

A. I don't see it, sir.

367 Q. And then when you say you had authority from the board of directors, you wish to correct that statement?

A. Yes, I probably issued it in advance.

Q. By whose authority did you issue it in advance?

A. I don't remember; I have an idea that it was at the meeting of the board of directors.

Q. I call your attention to the fact that on that minute book is a resolution authorizing the company to enter into a contract, and at the time of the minute no contract had been entered into, and that minute is dated August 30, 1890, and this payment of $100,000 is

August 30, and the issue of $150,000 of stock was August 30, 1890, and I ask you to explain that transaction.

(Objected to as immaterial.)

A. I cannot remember now.

Q. And yet you have stated in your treasurer's report that you had received $100,000, and paid on August 30, to A. C. Boyd & Co., $100,000?

A. Yes, sir. That certificate was not even written out by me, it was signed by me.

Q. Yes, but look at the face of it, isn't that your writing?

A. That is the cancellation stamp.

Q. That is not your writing on there?

A. No, sir, except the signature.

Q. Now then, as treasurer of the company, will you explain how it was that on that self-same day a division of that same certificate was made, and by what authority that was done?

(Objected to as immaterial and not proper redirect examination.)

A. That apparently was asked for by Mr. Boyd or A. C. Boyd & Co. because they didn't want it all in one certificate and wanted it in smaller parcels.

Q. But all of that was issued to others than A. C. Boyd & Co., was it not?

A. That I cannot tell; I can figure it up I guess. Apparently not, it don't figure up that number of shares.

368 Q. This minute book was shown to you on cross-examination and you said that the bonds were issued by the direction of the company (the minute book referred to being Defendants' Exhibit No. 1, H. D. Gamble, examiner)?

A. Delivered to A. C. Boyd & Co., yes, sir.

Q. Don't you know that on November 5th, 1890, at a regular monthly meeting of the board of directors, on motion of Mr. Norman, the company agreed—decided to issue bonds to the amount of $250,000 to A. C. Boyd & Co. at 95 cents on the dollar, in lieu of cash payments on their contract, and that such motion was passed and adopted?

A. I don't remember. I don't remember that the bonds were to — issued to A. C. Boyd & Co., but I believe they ask for a commission for selling them.

Q. Don't you now know, sir, that that resolution was accepted and agreed to?

A. I believe it was.

Q. Don't you know that Mr. Beamer was one of the committee to finance, together with Poole and Norman, all the bonds issued, the sales of the bonds?

(Objected to as immaterial.)

A. I seen that in the books yes, sir.

Q. Is that your only recollection?

A. Yes, sir; I don't know that there was any committee appointed.

Q. Don't you know that at a regular meeting of the board of directors held at Irwin on January 7, 1891, as shown by page 31 of Defendants' Exhibit No. 1, H. D. Gamble, that Mr. Beamer moved that the treasurer pay A. C. Boyd & Co. seventy-five bonds of $1,000 each on account of the next ensuing payment, in accordance with their request?

A. I know by my report that I paid seventy-five bonds about that time.

Q. Don't you know that at the regular meeting held February 5, 1891, as appears upon page 35, of the said exhibit (Defendants' Exhibit No. 1, H. D. Gamble), Mr. Beamer moved that the treasurer be instructed to pay A. C. Boyd & Co. $25,000 in cash and
369 $30,000 in bonds on account of the payment?

A. Yes, sir; my statement shows that too.

Q. Then don't you know that Mr. Beamer at the same time moved, at the same meeting moved that the treasurer be authorized to deliver to A. C. Boyd & Co. 145 bonds of $1,000 each on payment to him of the sum of $100,000, and their receipt for $37,750 on account of their payment on the contract?

A. I don't know, but I presume it was so, because I think I only made three bond deliveries.

Q. Don't you know that at the meeting of April 1st, 1891, appearing at page 37 of Defendants' Exhibit No. 1, H. D. Gamble, that your report of April 1st, 1891, being Defendants' New York Exhibit "E," H. D. Gamble was, on motion of Mr. Beamer accepted?

A. I cannot remember.

Q. Don't you know that at the same meeting, on page 38, Mr. Beamer moved that the treasurer pay A. C. Boyd & Co. $10,000 in cash on account of the contract, and further, that the treasurer be authorized to pay A. C. Boyd & Co., on request of executive committee, $145,000 in bonds, or any portion of said amount in cash, in lieu of bonds?

A. I cannot remember those things.

Q. Have you got the report of the executive committee which will show the deposit of the $145,000 of bonds?

(Objected to.)

A. I don't know what they are; I never had them.

Q. Don't you know that at the regular monthly meeting of the board of directors, held at Irwin, June 3, 1891, on page 41 of Defendants' Exhibit No. 1, H. D. Gamble, that Mr. Beamer moved that the treasurer be directed to set aside the sum of $7,500 out of the money now in his hands, or the first money received by him, for the purpose of paying coupons of the bonds of this company coming due July first next, and that he deposit the same for that purpose with the Farmers' Loan and Trust Company of New York City?

A. I don't remember, but I know that I deposited money with the Farmers' Loan and Trust Company.

370 Q. Was that money part *part* of the capital stock, or paid for out of loans?

A. It was from the funds of the Pennsylvania Plate Glass Company.

Q. I make a distinction between the funds. Was it paid out of the proceeds of the stock of the company, or by loans for that purpose?

(Objected to because the witness has already testified that the bonds were issued in payment of the contract.)

A. I don't remember. Was that the first coupons?

Q. I suppose so.

A. I don't remember.

Q. At that time was not Mr. Beamer a bondholder?

(Objected to as immaterial.)

A. At the time of the paying of the bonds?

Q. The coupons?

A. Of the coupons?

Q. Yes, the first year.

A. I won't say positively, but I think he was.

By Mr. BLANC: I move to strike out the answer on the ground that it is hearsay.

Q. Don't you know that at the same meeting on the same page Mr. Beamer moved that the treasurer of this company be directed to arrange for the payment of the coupons of this company coming due July 1st, either by the sale of stock or otherwise, in his discretion, and for that purpose the president, secretary and treasurer are thereby authorized to make, execute and deliver the necessary notes or other evidences of indebtedness?

A. I don't remember how that money was raised.

Q. Don't you remember that at the same meeting, on page 42 of the same exhibit (Defendants' Exhibit 1, H. D. Gamble), that Mr. Beamer moved that the treasurer be instructed to issue to A. C. Boyd & Co. $50,000 in stock of this company and deliver $60,000 of the bonds of this company to A. C. Boyd & Co. on account of payments under their contract and that he take their receipt therefor? That was your authority, wasn't it?

A. Are those the 60 of the 75 bonds?

371 Q. I don't know, sir; I am asking you.

A. About what time was that?

Q. That was the meeting of June 3rd, 1891.

A. I cannot recollect all the payments of bonds, what payment of bonds that was, whether that was the first lot of the 75.

Q. Don't you know that at the same meeting Mr. Beamer moved that the president, secretary and treasurer be directed to make, execute and deliver to A. C. Boyd & Co., on account of their contract, four notes of $5,000 each, running three months without interest, four notes at $5,000 each, running four months without interest, and one note of $2,500 for four months without interest?

By Mr. BLANC: Objected to as immaterial and not proper redirect examination.

A. I don't remember.

Q. Don't you know that you as trustee for A. C. Boyd & Co. received such notes?

(Same objection.)

A. If they were made out, and the plant wasn't completed, I probably received them.

Q. You know the date, June 3, 1891, don't you?

A. I don't remember whether the plant was completed then or not.

Q. Can you now recollect what time the plant was completed?

A. I think it was some time in June, but I ain't positive.

Q. Don't you know that at the same meeting, on page 43 of the same exhibit (Defendants' Exhibit No. 1, H. D. Gamble), Mr. Beamer moved that A. C. Boyd be appointed as general manager of this company, and that he be paid a salary at the rate of $6,000, payable monthly, such salary to begin July 1st, next, and that he enter upon his duties forthwith?

(Objected to on the same ground.)

A. I remember that Mr. Boyd was appointed manager at $6,000 a year; yes, sir.

372 Q. You mean to say that you had no salary affixed to your office?

A. I don't know whether they had a fixed salary; they didn't at first, but latterly I think they did. I got no salary.

Q. Do you know whether Mr. Kann got any salary?

A. I think not.

Q. Don't you know that at the meeting of July 23rd, 1891, as appears on page 46 of the same exhibit, (Defendants' Exhibit No. 1, H. D. Gamble), the treasurer's salary was fixed at $2,500 per annum?

A. I think literally there was a salary fixed, but I never got any.

Q. Don't you know that at that same meeting, on page 46, (of Defendants' Exhibit No. 1, H. D. Gamble) Mr. Beamer moved that the salary of the president be fixed from July 1st, 1891, at the next annual election, at the rate of $4,000 per annum, and you honored warrants or vouchers for it?

A. All vouchers that were properly drawn I honored, that is, when they were sent in to me.

Q. Don't you know that Mr. Norman moved that Mr. Beamer be selected to fill the unexpired term of the late Thomas McKie, as vice-president, and that Mr. Norman further moved that the first vice-president be voted a salary at the rate of $2,500, to take effect from July 1st?

A. I know that Mr. Beamer got a salary, but I don't know when it began.

Q. You honored vouchers for him, I suppose?

A. Oh, yes; I would only pay by voucher.

Q. And so you honored the vouchers for everybody else except yourself?

A. They never sent me in my vouchers.
Q. Did you get your compensation in any other way?
A. No, sir; not that I know of; I got no money at all.
Q. Did you not get stock or bonds?
A. No, sir.
Q. Or preferred stock?
A. I don't think I did; I think they paid me once for three mileage trips; that is all the money I ever got out of them.

373 Q. Don't you know that at the meeting of August 5th, 1891, as appears on page 51 of Defendants' Exhibit No. 1, H. D. Gamble, that Mr. Beamer offered a certain preamble and resolution, the preamble being that "Whereas, A. C. Boyd & Co. have communicated with this board stating that there is a balance to become due them on or before the completion of their contract with this company of $55,000 in cash and $100,000 in the stock of the company, and asking the company to accept the works in their present condition, and retain a certain sum until the entire completion of the works; and also asking the company to accept a reduction of $6,000, in lieu of the building of the office building. Resolved that the company accept the works in their present condition and that they pay to A. C. Boyd & Co. $100,000 in the capital stock of the company, and retain the cash payments until the works are entirely completed under the contract, in a satisfactory manner, and Resolved, that the offer of A. C. Boyd & Co. to reduce the amount of payment under the contract for the sum of $6,000 in lieu of the office building be declined, and Resolved, that if this proposition be accepted by A. C. Boyd & Co., the treasurer is directed to issue to A. C. Boyd & Co. 1,000 shares of the capital stock of this company." Do you recollect whether or not the settlement was made? I ask you now as trustee of A. C. Boyd & Co., as well as treasurer, whether the settlement was made in pursuance of that resolution?

A. I don't remember; I had no interest in A. C. Boyd & Co.'s settlements, only in their money, in the handling of their money.

Q. Is it not true that somewhere about January or February, 1893, the president of the company ordered you to bring your books, stock ledger and certificate books to the works at North Irwin?

A. I don't know what time it was, but I know my books were to be brought out to be examined by some committee at one time.

Q. An auditing committee?

A. I believe it was an auditing committee; yes, sir.

374 Q. Have you tried to remember at how early a period Mr. Beamer was out with you at North Irwin prior to the incorporation of the company, or about the time of the incorporation of the company?

A. I think he was out there about the time of the incorporation, but whether it was immediately preceding or immediately after, I cannot say. Latterly we only went out once a month, but before that, while they were building, we went out there considerably oftener, and of course I wouldn't be able to remember distinctly just when it was.

Q. Can you recollect any inquiries or conversations at that time

at which Mr. Beamer was present, about the probable cost of the plant to the contractors?

A. He may have spoken to them, but he couldn't to me, because I knew nothing about it.

Q. You didn't hear any such conversations?

A. Not to my knowledge; no, sir.

Q. These treasurer's reports of yours purport to be cash accounts, don't they?

A. Yes, sir.

Recross-examination by Mr. BLANC:

Q. I suppose at this distance of time you don't recollect all the details of that transaction as treasurer of this company, do you?

A. Absolutely nothing. The only thing that recalls it is when I see those reports.

Q. What you do recollect, however, is that you kept accurate accounts of your receipts and disbursements?

A. Yes, sir.

Q. And you can swear that those accounts are correct?

A. Yes, sir; my accounts balance to the penny.

Q. And that all the items that appear in those accounts as receipts are correct?

A. Yes, sir.

Q. That you are certain of?

A. Yes, sir.

Q. And you swear to that?

A. Yes, sir.

Q. So that all the items which appear as receipts in this report of yours, referred to as Defendants' New York Exhibit D, H. D. Gamble, are correct?

A. Yes, sir.

375 Q. And they represent receipts?

A. Yes, sir.

Q. Now, as a matter of fact, the contract which has been shown to you between A. C. Boyd & Co. and the Pennsylvania Plate Glass Company, Defendants' Exhibit 11, H. D. Gamble, examiner, was actually executed by the Pennsylvania Plate Glass Company, was it not?

A. Yes, sir.

Q. And that contract calls in paragraph six for the payment, or the first payment, to Boyd of $100,000 in cash and $150,000 in stock, does it not?

A. Yes, sir.

Q. The $150,000 in stock was actually turned over to A. C. Boyd & Co.?

A. Yes, sir.

Q. Are those the 1,500 shares of stock that appear to have been issued to Boyd & Co. on the 30th day of August, 1890?

A. That one certificate, yes, sir.

Q. Those are the stock that were issued to them as a part of the first payment under the contract?

A. Yes, sir.

Q. And the $100,000 in cash for which you drew a check to their order, represents the $100,000 in cash called for in that contract?

A. Yes, sir.

Q. Now, these resolutions which have been read to you by the counsel for the defendants confirm you in your recollection, do they not, that the bonds were all turned over to A. C. Boyd & Co.?

A. $150,000 of them, yes, sir.

Q. In the beginning?

A. Yes, sir.

Q. And they balance also, do they not?

A. Why, the resolutions don't say—I know I turned over $250,000 in bonds to Boyd.

Q. Your attention has been called by the counsel for the defendant to a resolution of the board of directors, at the meeting of February 4, 1891, on page 35 of Defendants' Exhibit No. 1, H. D. Gamble, examiner, in which resolution Mr. Beamer moved that the treasurer be authorized to deliver to A. C. Boyd & Co. $145,000 of bonds upon the payment to him—that is, to the treasurer?

A. Yes.

Q. (Question continued.) Of the sum of $100,000 and their
376 receipt for $37,750 on account of payment under their contract. Do you know whether or not A. C. Boyd & Co. ever paid to the treasurer of the company $100,000 and gave a receipt for $37,750 under that resolution?

A. I don't remember.

Q. Your attention has also been called to another meeting on April 1, 1891, of the board of directors, and to a motion made by Mr. Beamer that the treasurer pay A. C. Boyd & Co. $10,000 on account of the contract, and further at the request of the executive committee, pay $145,000 in bonds, or any portion of said amount in cash in lieu of bonds. Now, in view of those two resolutions, the one in February and the other in April, do you not remember that the bonds, the $145,000 of the remaining bonds were not delivered to A. C. Boyd & Co. under the resolution of February, since they were in the possession of the company subsequent to the 1st of April, 1890?

A. I could not have delivered them twice.

Q. And your report marked Defendants' Exhibit E, dated April 1, 1891, shows that at that date you had in your possession the remaining $145,000 worth of bonds?

A. On April 1st I had $145,000 worth of bonds, according to that report.

Q. I call your attention to a monthly meeting of the board of directors held on June 3, 1891, in Defendants' Exhibit No. 1, in which a motion was made that the treasurer be directed to set aside the sum of $7,500 out of the money now in his hands, or the first money received by him, for the purpose of paying the coupons of

the bonds of this company. Those coupons were actually paid, were they not?

A. Were they the first coupons?

Q. Yes, those were the first coupons.

A. I deposited that money in the Farmers' Loan and Trust Company.

Q. $7,500?

A. Yes, sir.

Q. Representing the semi-annual interest on $250,000 of bonds?

A. Yes, sir.

Q. So that you would infer from this that the $250,000 of
377 bonds had all been issued prior to June 3, 1891, which was the date of this meeting?

A. No, I knew that the interest was $7,500, and I deposited it; I don't know whether they had been issued or not.

Q. I call your attention to the original certificate of organization of the Pennsylvania Plate Glass Company, being Defendants' Exhibit No. 7, H. D. Gamble, and ask you to state upon what date the acknowledgment of that instrument was made.

A. First day of August, 1890.

Q. So far as you know, prior to the 30th day of August, and subsequent to the first day of August, 1890, the persons, Wray E. Davis, and the other persons appearing as subscribers on that instrument may have assigned their subscriptions, or part of their subscriptions to another person?

A. I don't know.

Q. You have absolutely no knowledge to the contrary?

A. No, sir.

Q. All your actions as treasurer were either done subject to prior authority of the board of directors, or was subsequently confirmed by the company?

A. Yes, sir.

Q. You never did anything which was contrary to the directions of the company?

A. No, sir.

Q. Or without authority from them?

A. Not to my knowledge.

Q. In the issuance of stock or bonds?

A. Not to my knowledge.

By Mr. SCHOYER:

Q. How do you account for your positiveness of memory as to what you have just now said in answer to the last two or three questions, when your memory is so very defective when I ask you?

By Mr. BLANC: I object to the form of that question, and I object to the counsel asking how he accounts for the lapses of memory, as absolutely immaterial.

A. As to the question whether I did anything contrary to
378 the rules of the company, why, I know positively I did not. I know I helped them and tried to help them all I could.

Q. How do you know that?

A. I know I worked as hard and faithfully as I could for the interest of the company.

Q. Yes, but you have no memorandum, and you cannot remember whether you had any memorandum?

A. I know what I did for them, and when I take an interest in a thing, and work for it I work faithfully for it.

Q. You as treasurer know when the company began to make receipts for its work?

A. Yes, sir, I got the checks the first checks for their output.

Q. When was that?

A. That must have been—I cannot recollect the year, but it must have been in the fall of the year.

Q. Of what year?

A. I cannot tell whether it was 1890 or not.

Q. How could it be 1890, when it was only organized in 1890?

A. 1891, then it was.

Q. Then, out of what assets or resources of the company could you possibly have paid the coupons,—it wasn't out of the income, because there wasn't any at that time?

A. Presumably out of my pocket.

Q. By a loan?

A. By a loan. I think I said before I had a note discounted for them for $20,000 or $30,000, and I think that was prior to the payment for coupons.

Q. Don't you know that the company issued its note and that you negotiated it, and perhaps endorsed it?

(Objected to as leading.)

A. Probably that is the way it was. I know I paid the note so I look on it as if it was my own.

By Mr. SCHOYER: I now call Mr. J. G. Beamer for further cross-examination.

By Mr. J. G. BEAMER: And I decline to be sworn.

By Mr. BLANC: So far as the counsel for the plaintiff is
379 concerned Mr. Beamer has been examined and cross-examined thoroughly in this case and we see no reason why he should be recalled so far as we are concerned.

By Mr. SCHOYER: I want that statement on the record.

By Mr. BLANC: I ask the examiner to have that stricken out, because I don't raise any objection. The counsel for the Farmers' Loan and Trust Co. makes no objection to Mr. Beamer being recalled for further cross-examination.

By Mr. SCHOYER: Thereupon I call Mr. Beamer to the stand for further cross-examination.

By Mr. J. G. BEAMER: Whereupon Mr. Beamer replies to the counsel that he has been sworn in this case, examined and cross-examined, and his direct testimony taken on the part of the defendant at such examination, and pending the advice of counsel he declines to be sworn.

By Mr. SCHOYER: You had better get straight on the record; you have already been sworn; you mean you decline to testify.

By J. G. BEAMER: I will consult counsel, and inform the examiner whether I will give further evidence in this case within a reasonable time.

By Mr. SCHOYER: The defendants' counsel gives notice that he will insist upon the right to further cross-examination before the proper legal tribunal at the expense of Mr. J. G. Beamer.

By Examiner GAMBLE: The witness, J. G. Beamer, being present at this examination, and having been requested to testify further under cross-examination, and having declined so to do, the examiner certifies this question to the circuit court for the southern district of New York, that counsel may have an opportunity to apply for such remedies to compel the witness to testify, as may be provided therefor, or to the circuit court of the western district of Pennsylvania.

By Mr. J. G. BEAMER: At the request of the counsel for the plaintiff in this case I am willing to be further cross-examined.

380 JAMES G. BEAMER recalled.

Cross-examination by Mr. SCHOYER:

Q. At what time did you acquire bonds 241, 242, 24, 23, 244, 1, 2, 3, 4, 5, 6, 7, 8, 9, 25, 28, 30, 29, 31 and 35 of the Pennsylvania Plate Glass Company, which you have testified to your ownership of in this case?

A. I cannot answer.

Q. What year?

A. I don't know.

Q. Was it before or after the receiver's sale?

(Objected to as immaterial.)

A. The great majority of those, if not all, were acquired before the receiver's sale.

Q. How long before the receiver's sale?

(Same objection.)

A. I presume between two and three years.

Q. Those that you received after, from whom did you receive them, A. C. Boyd & Co.?

(Same objection.)

A. I don't know that I received any after the receiver's sale.

Q. You don't?

A. No.

Q. Now, as to the bonds you say which are in Mrs. Hill's possession, Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; when did you acquire those bonds that you sold and conveyed to Mrs. Hill?

(Same objection.)

A. I think in 1891.

Q. And those bonds which are held by your wife, 27, 26, 33, 34, 32, 58, 59, 62, 63, 243, 248 and 245?

(Same objection.)

A. I cannot tell. I will make answer in regard to Mrs. Hill's bonds from the fact that they were among the early numbers, and I think I acquired those shortly after they were issued.

Q. Meaning, I suppose, that in A. C. Boyd's issue of those bonds they followed seriatum, the first in number and so on? In
381 order to make this clear, the numbers I have given you are taken from your testimony, and those are the correct numbers?

A. Yes, I presume so.

Q. Don't you recollect that you entered into negotiations or correspondence with A. C. Boyd after the receiver was appointed for the Pennsylvania Plate Glass Company for the purchase of bonds of the Pennsylvania Plate Glass Company then owned or hypothecated by or belonging to A. C. Boyd & Co.?

(Objected to as immaterial.)

A. I may have entered into such correspondence, but I have no remembrance of it.

Q. Have you a remembrance of the fact that you did come into possession of bonds, or some of these specific bonds at or about the date of such correspondence or interview with Mr. Boyd, and as late as the year 1896?

(Same objection.)

A. I never bought any bonds from A. C. Boyd to the best of my remembrance.

Q. From whom then in 1896, the point is the time?

A. I may have bought one or two bonds during the year 1896, but I am not sure.

Q. Do you recollect the correspondence, for the purpose of fixing the dates, on this question, between you and Mr. Boyd in relation to the proposed plate-glass works to be designed and built in Cowten?

(Objected to as immaterial.)

A. I do.

Q. Was it after that time that you acquired some of these bonds?

A. I don't think I acquired any bonds after that date.

Q. But what bonds you did acquire came immediately through A. C. Boyd & Co.?

A. Yes, sir.

Q. You were on the finance committee, were you not, of the Pennsylvania Plate Glass Company to finance the bonds?

(Objected to as immaterial.)

382 A. It appears by the record I was.

Q. You were one of the committee to call upon Jameson & Co., bankers, in relation to the negotiation of those bonds?

(Same objection.)

A. I was not. I would like to correct that last statement. I think in company with Mr. Poole, or Mr. Norman, I called upon Jameson & Co. in Philadelphia, but there was no interview held, or no action taken, and I am not sure whether it was in reference to this bond transaction or some other transaction. I never met any of the firm of Jameson & Co. to my knowledge.

Q. You couldn't recollect when you were on the stand before the exact time when you became interested as a stockholder of the company. I now call your attention to your stock account in the stock ledger, Defendants' Exhibit No. 2, H. D. Gamble, examiner, on page 30, and to the entry November 5th "To assignment from Davis's subscription one share," and the subscription number 65?

A. I have seen them.

Q. Will that fix the date as that time?

A. Yes, sir.

Q. How long before you acquired your share of stock had you been in consultation as to becoming interested in this company?

A. Only a few days.

Q. And you had been out at Irwin prior to acquiring that stock, hadn't you?

A. I went out to Irwin, and at the time this share of stock was issued to me it was within a few days of that time, and that was the first time I ever heard of the Pennsylvania Plate Glass Company and this share of stock was issued to — for the purpose of electing me a director at the meeting that was held there at that time, the first time I had been out there.

Q. With whom did you have your negotiations for the acquiring of stock in the Pennsylvania Plate Glass Co.?

By Mr. BLANC: Objected to as immaterial and not proper cross-examination as to this one share of stock.

383 Q. Any?

(Same objection.)

A. The negotiations as to this one share of stock was had with I guess all the members of the board that were present. I took the share of stock and paid for it.

Q. Did you not have conversations with Philip Semmer prior to acquiring this stock?

(Same objection.)

A. I did.

Q. Do you recollect what the arrangement was?

(Same objection.)

A. What the conversations were?

Q. Yes.

A. They were conversations here in New York, and while I was out there this time.

Q. As to the terms which were offered to you, I mean, if you became a purchaser, in the event of your becoming interested as a stockholder?

(Objected to as immaterial and not proper cross-examination.)

A. These conversations were held at Irwin at this time.

Q. What were they?

(Objected to as immaterial and not proper cross-examination.)

A. Well, I don't remember, but part of the conversation was that if I would take a certain amount of stock that the company would elect me a director and vice-president.

Q. On salary?

A. Not at that time on salary.

Q. No, but that the salary would be in the future fixed for you?

A. Yes, after the works were running I would be paid a salary.

Q. Do you recollect at what time you became a director of the company?

(Same objection.)

A. At the date this share of stock was issued to me. As I
384 remember this share of stock was issued to me to enable me to become a director, and I think I was elected at that time. I bought the share of stock, and paid for it.

Q. But I see there is that entry on the stock ledger as coming from Davis?

By Mr. BLANC: I object to that statement, the stock ledger speaks for itself.

A. My best recollection is that the statement was made that all this stock had been subscribed for by various parties, and that this share of stock or any other share I might want to acquire would be assigned to me on the subscription, provided for in some way. That is the best recollection I have of the matter.

Q. You were present at the meeting to vote on the question of issuing bonds, were you not?

(Objected to as immaterial.)

A. From the records it appears I was; I don't remember.

Q. You knew who the contractors would be or were for the company at that time?

(Objected to as immaterial and not proper cross-examination.)

A. Yes, sir, I knew it was A. C. Boyd & Co.

Q. Do you know Mr. Boyd's handwriting?

(Objected to as immaterial and not proper cross-examination.)

A. I was quite familiar with it.

Q. Wasn't it a part of this arrangement that you were to have stock on the same terms that Poole and Klopfer were to have it?

By Mr. BLANC: Objected to as immaterial and not proper cross-examination, counsel for the plaintiff stating here that while he has not objected to the counsel for the defendants continuing his cross-examination of this witness, although plaintiff's testimony has long been closed and the examiner is now taking testimony under a defendants' notice, he does object to anything except strict cross-
385 examination and will make a motion before the court to strike it out on the ground that the examiner had no authority to take any testimony under the defendants' notice at this time.

(Question withdrawn.)

By Examiner GAMBLE: The witness, C. W. Poole, requests of the examiner permission to make a statement respecting the testimony which he has given here, and the examiner allows him that privilege.

By Mr. BLANC: Counsel for the plaintiff has no objection to the witness making the statement, but calls attention to the fact that the witness has been sitting here during this entire hearing and has been hearing the testimony of other witnesses, and counsel for the plaintiff reserves his right to make a motion to strike out the testimony of this witness because it is out of order.

C. W. POOLE recalled.

With regard to the payment of that $100 check to Mr. Cowen which I testified about I want to say that I paid that to Mr. Cowen knowing that he was the treasurer of the Pennsylvania Plate Glass Company, although I don't know what he done with the money, whether it went in the treasury of the plate glass company or whether it went to A. C. Boyd & Co., as I got a certificate of stock that came from A. C. Boyd & Co. The finances of the company were all attended to here in New York, and when they were brought there they were passed upon by the board of directors, and I presume that everything was straight and right, and my signature was put to all the papers on that presumption.

By Mr. BLANC: Counsel for the plaintiff objects to any questions being asked the witness, who has only been called to make this statement, and I will make a motion to strike out any further testimony that the witness may give.

By Mr. SCHOYER:

386 Q. You stated that you presumed everything was correct. From whom did you derive that presumption?

A. From the attorney of the company and the people who were financing the affairs of the company.

Q. Who was the attorney of the company?

A. Living-ton Norman, I believe.

Q. And who were the people that were financing?

A. Mr. Cowen and Mr. Semmer and Mr. Norman at the start, the first start when the charter was got. They were present at all of the meetings.

Q. And you refer then only to the financing of the stock, is that it?

A. The financing of the stock, yes, sir. The stock book was kept here, and I didn't come to see it at all, and when transfer was made I signed the certificates, and I presumed that everything was all right.

Q. Those are all the corrections you want to make in your testimony?

By Mr. BLANC: I object to the counsel suggesting to the witness that he might have other corrections to make.

A. I might state this, that I said on the examination that no stock was issued except for value. What I meant by that was that it was in pursuance of the contract or something else that was an offset to it. That is all I think I wish to say.

Q. The contract you refer to was with whom?

A. With A. C. Boyd & Co.

By Mr. BLANC:

Q. What you mean is that no stock was issued without *quid pro quo?*

A. I don't understand the term exactly.

Q. You don't understand it?

A. I think I do partly.

Q. If you do understand it, answer the question.

A. I would like to have it a little more definite; I don't grasp it exactly.

387 Q. What you mean is that no stock was given away; is that what you mean?

A. Only in pursuance of the contract and when something was given in its stead.

Q. No stock was issued for which the company didn't receive some benefit?

A. I don't remember of any.

Adjourned to Tuesday, December 21, 1897, at 10.30 a. m.

DECEMBER 21, 1897.

Met pursuant to adjournment.

(Same appearances.)

*Testimony of George N. Olcott.*

GEORGE N. OLCOTT, called as a witness on behalf of the defendants, being duly sworn and examined, testified as follows:

Direct examination by Mr. SCHOYER:

Q. You were connected with the Lloyd Plate Glass Insurance Company in the year—for some years?

A. Yes, sir.

Q. In what position?

A. Chairman of the executive committee; member of the board of directors and chairman of the executive committee.

By Mr. BLANC: What are you going to prove by this witness?

By Mr. SCHOYER: I am going to prove admissions by Beamer of the price paid for the bonds.

By Mr. BLANC: I shall make a motion to strike out all of the testimony of this witness, on the ground that it is immaterial and irrelevant to the issues in this action.

Q. You know Mr. James G. Beamer?

—. Yes, sir; I do know him.

Q. At one time president of the Lloyd's Plate Glass Insurance Company?

A. Yes, sir.

Q. Do you recollect the purchase by your company of $10,000 of bonds of the Pennsylvania Plate Glass Company?

By Mr. BLANC: Objected to as immaterial to the issues.

388 A. I do.

Q. I wish you would state, sir, from whom the company made that purchase.

By Mr. BLANC:

Q. What official capacity did you say you occupied with that company?

A. I was chairman of the executive committee and member of the board of directors.

By Mr. SCHOYER:

Q. I wish you would state from whom the company made that purchase.

(Same objection.)

A. It was understood that the committee made the purchase from the Pennsylvania Plate Glass Company.

Q. Through whom?

(Same objection.)

A. Through James G. Beamer.

Q. At what price?

A. Par and interest.

Q. At any time subsequent to that purchase was the subject of it a matter of investigation?

(Same objection.)

A. It was.

Q. By the Lloyd's Plate Glass Company?

A. Yes, sir.

Q. Was Mr. Beamer present at the time of that investigation?

(Same objection.)

A. Yes, sir.

Q. I wish you would state whether or not anything was said by Mr. Beamer as to the prices paid by him for the bonds which he sold to your company at par and interest?

(Objected to as immaterial, and also on the ground that it is irrelevant, and calling for hearsay evidence; and also that this witness has not been shown to have been present at any such conversations.)

A. Shall I answer now?

Q. Yes.

389 A. Mr. Beamer admitted to me and to Mr. Henry Coffin that he had made a profit on the sale of the bonds to the company.

Q. And when was it that you discovered that instead — purchasing from the Pennsylvania Plate Glass Company, you were really purchasing from Mr. Beamer?

(Same objection.)

A. Mr. Beamer made that statement at a meeting of the board of directors, when he was on trial; at the trial which resulted in his deposition from the presidency of that company.

By Mr. BLANC: I move to strike out the answer as not responsive.

The WITNESS: Mr. Beamer admitted that the bonds were a part of fifty bonds which he had purchased.

Q. Was anything said about the rate at which he had purchased the fifty bonds?

By Mr. BLANC: Objected to as immaterial.

A. He declined to tell us what the property was, according to my recollection, but I will say that the minutes of that trial meeting of the board of directors are in existence and will show exactly what Mr. Beamer said; that a stenographer was then present at his request, a stenograper furnished by himself, and the company is in possession of the stenographic minutes.

Q. Do they form a part of the minutes of the meeting?

A. They form the full minutes of the meeting.

Cross-examination by Mr. BLANC:

Q. Mr. Olcott, were you a member of the finance committee?

A. I was not.

Q. Who authorized the purchase of these bonds?

A. The finance committee; their minutes show.

Q. You had nothing to do with that part of the transaction?

A. I had not.

Ry Mr. BLANC: Please state on the record the same general
390 objection to this testimony, and the same motion to strike out as was made with reference to the testimony of the other witnesses called by the defendant, on the general ground of immateriality and irrelevancy.

*Testimony of Charles H. Adams.*

CHARLES H. ADAMS, called as a witness on behalf of the defendants, being duly sworn and examined, testified as follows:

Direct examination by Mr. SCHOYER:

Q. Mr. Adams, you were at one time president of the Pennsylvania Plate Glass Company?
A. I was, sir.
Q. From what date to what date?
A. From July 6th, 1892, until the next election, I think some time in January; I don't remember the date.
Q. 1893?
A. 1893.
Q. About six months, in round numbers?
A. Yes, sir; well, it was about seven months.

By Mr. BLANC: May I ask what you are going to prove by this witness?
By Mr. SCHOYER: I am going to identify a lot of letters. I really cannot tell what I will be able to prove.

Q. You know Mr. James G. Beamer?
A. I do.
Q. He was connected with the company at that time?
A. Yes, sir; first vice-president.
Q. At that time he was also a director?
A. Yes, sir.
Q. Through whom did you have your connection as an officer of the company initiated and perfected?

(Objected to as immaterial and irrelevant to the issues.)

A. Through Mr. James G. Beamer.
Q. Had you ever had any conversations with Mr. Beamer at or about the time of the organization of the company, and about the time he first became interested in the company with respect to the Pennsylvania Plate Glass Co.?

By Mr. BLANC: Objected to as immaterial and irrelevant.

A. Yes, sir.
391 Q. Did such conversation relate to A. C. Boyd & Co. as contractors and the company as prospective purchasers from the contractors?

(Objected to as immaterial and incompetent and leading.)

A. Yes, sir.
Q. State the substance of that conversation.

(Same objection.)

A. The conversations were generally on various occasions when Mr. Beamer visited Philadelphia, either in connection with the

Lloyd's plate-glass business, or on his way to the works. It was a running degree of information given to me and imparted to me at different times, going on for some months.

Q. What about Boyd & Co.?

A. The works, he was telling me, had a brilliant outlook. The works—A. C. Boyd & Co. were putting up the works, and they were to be sold to the company on their completion.

Q. Are you familiar with the handwriting of Mr. Beamer?

A. Yes, sir.

Q. Seen him write?

A. Yes, sir.

Q. And have seen letters that he wrote?

A. I have.

Q. I want to have some letters identified by you. Whether I shall use them or not I don't know. I hand you Defendants' Exhibit No. 101—well, I don't know whether I will offer it, I only want it identified—and ask you whether that is identified.

A. Yes, sir; it is identified.

Q. Whether you recognize the handwriting?

A. Yes, sir.

By Mr. BLANC: If it is identified already, why are you handing it to him?

By Mr. SCHOYER: I understand that.

By Mr. BLANC: I object to the question as immaterial and incompetent, and secondly, on the ground that the paper is not offered in this case, and has already been identified.

Q. In whose handwriting is it?

(Objected to as immaterial.)

392 A. Mr. Beamer's.

By Mr. SCHOYER: I now offer this in connection with the witness's testimony.

By Mr. BLANC: I object to its admission, on the ground that it is immaterial.

(It is marked Defendants' New York Exhibit F, H. D. G., examiner.)

By Mr. SCHOYER: The said exhibit being in words as follows:—

By Mr. BLANC: I object to the counsel reading the exhibit; it speaks for itself.

By Mr. SCHOYER (reading): "Whereas, prior to the first day of January, 1893, the firm of A. C. Boyd & Co. paid back to this company shares of the stock of the company to the amount of $119,000; and whereas said stock has been paid into the treasury and cancelled, resolved that the stockholders of this company approve of the action of the directors and officers in accepting said stock in settlement with A. C. Boyd & Co."

By Mr. BLANC: I move to strike out the reading of the exhibit by counsel.

Q. You know what transaction this exhibit refers to?

(Objected to as immaterial.)

By Mr. BLANC: Is that exhibit dated?

By Mr. SCHOYER: I read all that was on it.

A. Well, this was something that Mr. Beamer wrote during the progress of a meeting.

Q. Do you recollect the making of a balance-sheet showing a loss of $119,000?

A. Yes, sir.

Q. Made up in December, 1892?

A. Yes, sir.

By Mr. BLANC: Objected to on the ground that it is immaterial and that the balance-sheet speaks for itself.

Q. Do you know whether a substitute balance-sheet was made up?

(Objected to as immaterial.)

A. Yes, sir.

393 Q. For what purpose was the second balance-sheet made?

(Same objection.)

A. The second balance-sheet was made for the purpose of making a better showing for the year's work.

Q. The first balance-sheet showing a loss of how much, about?

A. I cannot remember now; it was considerable, I know.

Q. Over $100,000?

A. Yes, sir.

Q. And how did the second balance-sheet show that loss to disappear?

By Mr. BLANC: Objected, on the same ground.

A. By wiping out this stock.

Q. By returning the stock to the treasury?

A. By returning it to the treasury.

Q. And treating that treasury stock as an asset?

A. Yes, sir; as an asset.

Q. And then the second balance-sheet showed what?

A. Showed a few thousand dollars, I think, surplus.

(Objected to on the same ground, and that the balance-sheet speaks for itself.)

Q. What became of that first balance-sheet?

A. Well, I don't know whether it was destroyed or not; I do not remember about that; it was recalled, not used; I cannot state whether it was destroyed or not.

Q. What balance-sheet was presented to the stockholders' meeting?

A. The second one.

Q. Was Mr. Beamer in the habit of attending the meetings of the board during your incumbency as president?

A. Yes, sir.

Q. How often would those meetings be held?

A. Well, they were called monthly, but we had meetings during the month, of course; it is now five years ago; if I could refresh my memory I could tell you.

Q. It is only generally speaking?

A. We had other meetings during the month.

394 Q. Do you know whether or not Mr. Beamer was consulted about the making, or the substitution of the second balance-sheet for the first?

By Mr. BLANC: Objected to as immaterial.

A. Yes, sir; of course he was a party to that.

Q. I now hand to you a letter and an envelope marked for identification Defendants' New York Exhibit No. 1, H. D. G., examiner, and ask you whether you recognize that letter, to whom it was addressed and in whose handwriting it is?

By Mr. BLANC: I object to the question as immaterial.

A. Yes, sir; it was addressed to me and signed by Mr. Beamer; it is in his handwriting.

By Mr. BLANC: I object to the witness stating any of the contents of the paper.

Q. The envelope that is pinned there to that paper; do you recognize that?

A. No; that is not Mr. Beamer's handwriting.

By Mr. SCHOYER: We will take it off then.

Q. I now hand to you Defendants' Exhibit No. 47, H. D. Gamble, examiner, and Defendants' Exhibit No. 48, H. D. Gamble, examiner; one being a letter addressed to A. C. Boyd, and purporting to be signed by J. G. Beamer, and the envelope being addressed to A. C. Boyd, Esq., and ask you in whose handwriting that is?

(Same objection.)

By Mr. SCHOYER: One moment.

Q. (Continuing:) This envelope and letter also being marked Defendants' New York Exhibits 2 and 3.

(Same objection.)

A. That is Mr. Beamer's handwriting.

Q. I now hand to you a letter marked for identification, Defendants' New York Exhibit No. 4, from the Poland Spring house, South Poland, Maine, dated August 5th, 1892, purporting to be signed by J. G. Beamer; do you identify that?

395 (Objected to as immaterial.)

Q. I ask you if you recognize the handwriting, by whom it was written and signed, and whether you have ever seen it before.

(Objected to as immaterial.)

A. This was written to me; signed by Mr. Beamer.

Q. In whose handwriting is it?

A. In his handwriting.

Q. I also hand you a letter marked for identification, Defendants' New York Exhibit No. 5, dated New York, December 20th, 1892, addressed to Mr. Adams, and purporting to be signed by J. G. Beamer.

(Objected to as immaterial.)

Q. And I ask you if you recognize the handwriting; by whom it was received, and in whose handwriting it is.

(Same objection.)

A. This letter is addressed to me, written by Mr. Beamer and signed by him.

Q. I also hand you a typewritten letter, dated New York, November 18th, 1892, addressed to you as president of the Pennsylvania Plate Glass Company, and purporting to be signed by J. G. Beamer, and marked for identification, Defendants' New York Exhibit No. 6; and ask you if you recognize the signature and by whom it was received.

By Mr. BLANC: I object, on the ground of its being immaterial.

A. It was addressed to me and signed by Mr. Beamer. I received it.

Q. I hand you also a letter dated New York, April 26th, 1892, addressed to you as president of that company, and purporting to bear the signature of J. G. Beamer, and I ask you to state whether that letter was received by you, in whose handwriting the signature is, the letter being marked for identification Defendants' New York Exhibit No. 7.

(Same objection.)

396 A. Yes, sir; that was received by me; the signature is Mr. Beamer's.

Q. Also Defendants' New York Exhibit No. 8, a letter dated New York, November 4th, 1892, addressed to you as president, and purporting to bear the signature of J. G. Beamer, and ask you whether or not you received that letter, and in whose handwriting the signature is.

(Same objection.)

A. That letter was received by me, and the signature is Mr. Beamer's.

Q. Also Defendants' New York Exhibit No. 9, being a letter dated October 31st, 1892, addressed to you as president, and purporting to bear the signature of J. G. Beamer, and I ask you the same question, whether you received that letter, and whether you recognize the signature, whose it is.

(Same objection.)

A. This letter was addressed to me and received by me, signed by Mr. Beamer.

Q. You recognize the signature?
A. Yes, sir; I recognize the signature.
Q. I now hand you a letter, with enclosures, being blank proxies, and an envelope dated Yonkers, December 31, 1893, addressed to you at the Monongahela house, Pittsburgh, Pa., and bearing the signature of S. M. Hill or L. F. Hill, being marked for identification Defendants' New York Exhibit No. 10, and ask you whether you received that letter.

(Same objection.)

A. Received the letter with these proxies?
Q. Yes, and the envelope.
A. No, I received this letter from Mrs. Hill at the Monongahela house, but I would not say that these were attached to that; I have not read the letter. If you will allow me a minute's time I will see what the letter says.
Q. Yes, certainly.
A. Yes, these were in this letter.
397 Q. These blank proxies?
A. Yes, sir; these were in the letter. I received the whole concern.
Q. You recognize it as having been received by you?
A. As having been received by me in Pittsburg with these enclosures from Mrs. Hill. It mentions in the letter what the enclosures are.

By Mr. BLANC:

Q. Are they described in the letter?
A. Yes, sir.

By Mr. SCHOYER:

Q. I now hand you a letter dated May 17, 1893, marked Defendants' Exhibit No. 38, H. D. G., examiner, and now marked Defendants' New York Exhibit No. 11, addressed to A. C. Boyd and purporting to be signed by J. G. Beamer; also a letter dated June 15th, 1893, to A. C. Boyd, marked Defendants' Exhibit No. 39, H. D. G., examiner and marked for identification Defendants' New York Exhibit No. 12; also a letter dated July 19th, 1893, being Defendants' Exhibit No. 57, H. D. G., examiner, and marked for identification Defendants' New York Exhibit No. 13, addressed to A. C. Boyd, and purporting to be signed by J. G. Beamer; also a letter dated November 1st, 1894, marked Defendants' Exhibit No. 55, H. D. G., examiner, and now marked for identification Defendants' New York Exhibit No. 14, addressed to A. C. Boyd, Esq., and purporting to be signed by J. G. Beamer, together with the envelope marked Defendants' Exhibit No. 56, H. D. G., examiner, and also a letter dated September 18th, 1894, addressed to A. C. Boyd, purporting to be signed by J. G. Beamer, marked Defendants' Exhibit No. 53, H. D. G., examiner, and the envelope thereto attached, marked Defendants' Exhibit No. 54, the said letter being now marked for identification Defendants' New York Exhibit No. 15; and also a letter

dated December 21st, 1894, to A. C. Boyd, Esq., purporting to be signed by J. G. Beamer, the letter being marked Defendants' Exhibit No. 49, H. D. Gamble, examiner, and now marked for identification Defendants' New York Exhibit No. 16, together with
398 the envelope marked Defendants' Exhibit No. 50; also a letter bearing date March 27th, 1896, being marked Defendants' Exhibit No. 51, H. D. Gamble, ex'r, and now marked for identification Defendants' New York Exhibit No. 17, addressed to A. C. Boyd, Esq., and purporting to be signed by J. G. Beamer, together with the envelope marked Defendants' Exhibit No. 52, H. D. G., and ask you if you recognize the handwriting of the body of the letters and of the signatures, and if you do state in whose handwriting they are.

By Mr. BLANC: They are objected to as immaterial and irrelevant.

A. Yes, sir; these letters I identify as being in the handwriting of Mr. Beamer and signed by him.

Q. In the handwriting of Mr. Beamer?

A. Yes, sir.

Q. I also hand to you a letter dated August 23rd, 1892, without address, signed J. G. Beamer, being marked for identification Defendants' New York Exhibit No. 18; and also a letter dated October 25, 1892, addressed to you as president of the Pennsylvania Plate Glass Company, and purporting to bear the signature of J. G. Beamer, and marked for identification Defendants' New York Exhibit No. 19; and also a letter bearing date March 26, 1894, addressed to A. C. Boyd, purporting to be signed by J. G. Beamer, being marked Defendants' Exhibit No. 60, and now marked Defendants' New York Exhibit No. 20, together with the envelope marked Defendants' Exhibit No. 61; and I ask you whether those letters were received by you and in whose handwriting the signatures are?

(Same objection.)

A. This letter without any address was to me; Exhibit No. 18 was to me, in Mr. Beamer's handwriting and signed by him.

Q. And received by you?

A. Yes, sir; received by me. The one marked 19 was ad-
399 dressed to and received by me, and signed by Mr. Beamer. This letter No. 20 is Mr. Beamer's handwriting and signed by him, but not to me.

Q. That is a letter to Mr. Boyd?

A. To Mr. Boyd.

Q. Also a letter dated September 21, 1892, addressed to you as president, purporting to be signed by J. G. Beamer, and now marked for identification Defendants' New York Exhibit No. 21; also a letter bearing date September 24, 1892, addressed to you as president, purporting to bear the signature of J. G. Beamer, and marked for identification Defendants' New York Exhibit No. 22; and also a letter dated New York, November 2nd, 1892, addressed to you as president, purporting to be signed by J. G. Beamer, and having also some lines

in writing ink, being marked for identification Defendants' New York Exhibit No. 23; also a letter dated November 28th, 1892, addressed to you as president and bearing the signature of J. G. Beamer, and a postscript in ink, and marked Defendants' New York Exhibit No. 24; also a letter dated September 30th, 1892, addressed to you as president of the Pennsylvania Plate Glass Company, and purporting to bear the signature of J. G. Beamer, and marked for identification Defendants' New York Exhibit No. 25, and ask you whether you received those letters, and in whose handwriting the signature and writing where the writing appears upon said letters, are?

By Mr. BLANC: I make the same objection to all these.

A. I identify all of these letters as being addressed to, and received by me, and signed by Mr. Beamer.

Q. And the handwriting, outside of the typewriting?

A. The writing is his.

Q. Also a letter of two sheets, dated April 10th, 1894, addressed to A. C. Boyd, Esq., and purporting to be signed by J. G. Beamer, together with the envelope, the said letter being marked for identification Defendants' New York Exhibit 26; also a letter dated Ashfield, North Carolina, March 20th, 1894, addressed to A. C. Boyd,
400 purporting to be signed by J. G. Beamer, and its envelope, said letter being identified as Defendants' New York Exhibit No. 27.

(Same objection.)

A. Do you wish me to answer one at a time?

Q. No. And I ask you whether or not such of the letters as are addressed to you were received by you, and in whose handwriting the signature is, and such of them as are addressed to other people, whether you recognize the handwriting and the signature, and whose handwriting it is?

(Same objection.)

A. Nos. 26 and 27 are in the handwriting of Mr. Beamer and signed by him, but not addressed to me—addressed to A. C. Boyd.

Q. Those are all that you have there?

A. Yes, sir.

Q. Do you know the handwriting of A. Livingston Norman?

A. I think I do.

Q. You have seen him write?

A. Oh, yes, frequently.

Q. I now hand to you Defendants' Exhibit No. 58, H. D. Gamble, examiner, dated New York, July 22nd, 1893, addressed to "My dear boy," purporting to be signed by A. Livingston Norman, and Defendants' Exhibit No. 59, being an envelope addressed to A. C. Boyd, Esq.; they are marked now Defendants' New York Exhibit 28, and ask you whether you recognize that?

A. I recognize that as Mr. Norman's signature and handwriting.

Cross-examination by Mr. BLANC:

Q. Mr. Adams, before you became president of this company, the Pennsylvania Plate Glass Company, in 1892, did you have any connection with it whatever?

A. With the glass company?

Q. With the Pennsylvania Plate Glass Company?

A. No, sir.

Q. None at all?

A. No, sir.

Q. You became a director and president of the company at about the same time?

A. Yes, sir, the same day.

401 Q. That was in July, 1892?

A. July 6th, the day of the Homestead strike.

Q. Now, you testified as to certain conversations which you held with Mr. Beamer; were those conversations subsequent to the building of the plant of the plate glass company?

A. It was before and during the construction of the plant.

Q. Before the construction of the plate-glass plant?

A. About that time.

Q. Weren't most of those conversations subsequent to the completion of the construction?

A. You mean after the buildings were entirely completed?

Q. After the buildings were completed.

A. No, sir.

Q. When were these conversations had?

A. The conversations began—they run over a period of a year. The conversations began before anything was done, and it ran along every time he came to Philadelphia; on his way out there he would stop to see me many a time, and I kept in touch with what was going on.

Q. Was that all after you became president of the company?

A. No, sir; long before.

Q. Long before?

A. Yes, sir; long before I ever thought of such a thing.

Q. Why then was Mr. Beamer conversing with you in regard to the affairs of this company, with which you had no connection?

A. You must know that I was the agent for Philadelphia of the Lloyd's Plate Glass Insurance Company at that time of which Mr. Beamer was the president, and we were personally and socially very intimate, and that was the way.

Q. So that he was conversing with you then as the agent of the Lloyd's Plate Glass Company; is that so?

A. No, not as agent; as friends; as two friends who would meet each other; he wanted me to go into the company for a time.

402 Q. What was his object in talking to you about these matters at all?

A. He wanted me to take stock for one thing.

Q. In the Pennsylvania Plate Glass Company?

A. Yes, sir; in the beginning; the same interest as any friend

would have in another where they are on good terms; I cannot define Mr. Beamer's thoughts; I don't know why he did it.

Q. He never said to you why he did it?

A. He never said why, excepting in a general way to speak of the glittering outlook, and it would be a good thing for me if I could arrange it to take some stock in the company.

Q. Your attention has been called in your examination-in-chief to a pencil draft of a resolution marked Defendants' New York Exhibit F, H. D. G. At what time was that resolution passed by the stockholders?

A. My impression is, sir, that it was passed—of course, the minute book would be better than my memory, especially as I have been away from there five years, but my memory is it was passed by the stockholders in January.

Q. 1893?

A. Yes, sir.

Q. At the time you were president?

A. Yes, sir; at the time I was president.

Q. You presided at the meeting?

A. No, I do not think I did at the stockholders' meeting; I cannot remember; I think we had some stockholder presiding.

Q. You were president?

A. Yes, sir; I may have presided; I wouldn't say.

Q. Didn't the by-laws of the company make it your duty to preside at the stockholders' meetings?

A. I do not remember about that; I cannot remember; I may have presided, but I know as a matter of deference, as a rule, at a stockholders' meeting, we would generally put somebody else in.

Q. Was this an annual meeting of the stockholders, or a special meeting?

A. I cannot tell that.

Q. But that resolution was adopted?

403 A. That was adopted. I should say it was the annual meeting, but it may have been a special meeting. The minutes will show that.

Q. Who offered the resolution?

By Mr. SCHOYER: The minute book will show.

A. It is putting my memory against the book. I should say it was a stockholder.

Q. Mr. Adams, I hand you the minute book of the company, marked Defendants' Exhibit No. 1, H. D. G., examiner, and I ask you to point out the minutes of that meeting where that resolution was adopted. I looked it over carefully and I cannot find it.

A. This appears to be a special meeting, and Mr. Beamer appears to have been chosen chairman.

Q. Will you please read the minutes as they appear there?

A. "A special meeting of the stockholders of the Pennsylvania Plate Glass Company was held at the office of the company May 10th"—that could not be the time—"in pursuance of a notice dated May 4th, 1893"——

By Mr. SCHOYER: I object to the folly of having the stenographer take this down and transcribe it.

By Mr. BLANC: I do not care to have you read any minutes, except the minutes where that particular resolution was adopted.

By Mr. SCHOYER: If you will look at this meeting, page 120 of this book, there is the resolution; that is a meeting of May 4th, 1893.

Q. Now, Mr. Adams, I call your attention to page 120, of the minute book, marked Defendants' Exhibit 1, and I ask you whether that is the meeting at which this resolution was offered and adopted.

A. Well, sir, as you see, I left there the latter part of January, 1893, and this ratification appears to refer back to this resolution, and this meeting was in May, 1893, when I was present.

Q. That is the stockholders' meeting where the resolution of the board of directors was ratified?

404 A. This appears to be a meeting—a special meeting of the stockholders, at which Mr. Beamer was chairman and Mr. Frank secretary; that is all I can tell you about it.

Q. At which this resolution was ratified, or appears to have been ratified?

A. At which this resolution appears to have been ratified.

Q. Prior to that date the resolution had been actually adopted by the board of directors?

A. And it refers back to my day; it refers back to the first of January, 1893.

Q. And prior to that, January, 1893, during your incumbency in office as president, that resolution was adopted by the board of directors; is that it?

A. Yes, sir; that is my memory.

Q. And at that meeting you were present?

A. At that meeting I was present.

Q. And acting?

A. Yes, sir.

Q. And assented in the adoption of the resolution?

A. It was done at the time that the annual statement was made out. That is the way I connected it in my mind.

Q. And the object of the resolution was to establish the lines of the annual statement?

A. Yes, sir.

Q. Now, as a matter of fact, was that resolution acted upon?

A. It certainly was.

Q. It was?

A. It certainly was.

Q. The $119,000 of stock referred to in the resolution was actually returned to the treasury of the company by A. C. Boyd & Co.?

By Mr. SCHOYER: I object to that. The witness had left, he said, four months before and had no connection with it.

Q. This resolution you have testified was adopted at a meeting at which you were present, Mr. Adams; is that true.

A. To the best of my knowledge and belief it was done at the time of the annual meeting—just before the annual meeting.

Q. This resolution reads as follows: "Whereas, prior to the
405 1st day of January, 1893, the firm of A. C. Boyd & Co. paid back to this company shares of the stock of the company to the amount of $119,000," etc. How then can you say that the $119,000 of stock was paid back after you left the company, when a resolution, passed at a meeting at which you were present, refers to the stock as having been already paid back to the company? Please explain that.

A. Of course I was there——

By Mr. SCHOYER: I object to that. The witness is not called on for explanation; having stated that a particular paper he identified was in the handwriting of Mr. Beamer, he had seen him write it, and that the matter itself did not come up until four months afterwards, at a time when he had left the company's employment, it precludes him from being required to make any explanation.

Q. Now, please make the explanation.

A. You see, I was there in January.

Q. Yes, I know you were.

A. That was in January, the fore part of January some time, but the minutes appear to be silent about it; that probably was the reason it was taken up in May.

Q. You mean by the stockholders in May?

A. By the stockholders.

Q. Did you draw up these balance-sheets to which you have referred?

A. No, sir.

Q. Who did draw up those balance-sheets?

A. Mr. Zell, our book-keeper.

Q. Was Mr. Zell subject to your orders as president?

A. He should have been.

Q. He was, was he not?

A. No, sir, he was not.

Q. Were you acting as president of the company at that time?

A. I was.

Q. Were you doing your duty as president at that time?

A. I was endeavoring to.

Q. How then do you say that Mr. Zell was not subject to your orders and acting under your orders all the time?

A. I mean just what I say.

406 Q. Well, explain if you can. I want to get at the facts.

A. I mean as president of that company I was handicapped by the action of A. C. Boyd & Co., and was not in power to do as I should do; that is the reason I wanted to resign frequently. Mr. Cowen, the treasurer, and Mr. Semmer and Mr. Boyd was the financial power; the books were kept in New York, excepting the scanty books we had at the office, and they were more or less opposed to me the whole time I was there.

Q. Do you think you were carrying out your duty as president by

presiding at meetings and assisting in the passing of resolutions that you knew nothing about?

By Mr. SCHOYER: Objected to as not cross-examination.

A. I did my duty, as far as it was possible to do it.
Q. Did you draw a salary as president?
A. I did, sir; the salary that was offered me by Mr. Beamer.
Q. What is that?
A. The salary that was proposed to me by Mr. Beamer before I went there.
Q. Well, the salary under a resolution of the company, I presumed?
A. I do not know whether it was or not; that he did not state.
Q. What was the amount?
A. $6,000.
Q. Did you ever see these balance-sheets?
A. Yes, sir.
Q. Did you have access to the books from which the balance-sheets were taken?
A. The books that you see there I had.
Q. The ledger and the other books of the company?
A. The ledger and the cash book.
Q. You did?
A. Yes, sir.
Q. Did you ever see the balance-sheet—the first of these two balance-sheets that you testified about?
A. Yes, sir.
Q. Did you see it before the second balance-sheet was substituted for it?
A. Yes, sir.
407 Q. You knew of the entire transaction?
A. Correct.
Q. You did not think there was anything out of the way in the transaction, did you?

By Mr. SCHOYER: Objected to as improper, not as cross-examination.

A. I did not think it was right.
Q. Why didn't you think it was right?
A. I did not think it was a fair statement to the stockholders.
Q. Now, be kind enough——
A. I wished to resign at the time, and sent my resignation to Mr. Beamer to present to Mr. Cowen, and he telegraphed me he would not present it.
Q. Will you be good enough to tell us exactly what statement was made to the stockholders in reference to this transaction?
A. The second balance-sheet was presented.
Q. What did the second balance-sheet contain?
A. It is there.
Q. It is not there. I do not see it here?

A. I think the second balance-sheet showed a nominal profit of a few thousand dollars, $3,000 or $4,000.

Q. I am referring particularly to the return of this $119,000 of stock?

A. Yes, sir.

Q. The second balance-sheet showed that the $119,000 had been returned to the treasury by A. C. Boyd?

A. Yes, sir.

Q. The first balance-sheet did not show that the $119,000 of stock had been returned by A. C. Boyd?

A. No, sir.

Q. Showed that that stock had been outstanding?

A. Yes, sir.

Q. As a matter of fact the stock had been returned?

A. I cannot tell whether it had been returned or not; these books were kept in New York.

Q. But this resolution, to which we have been referring, passed at a meeting at which you were present, does state that the stock had been returned, doesn't it?

A. Yes, sir; every time we had any meetings of the board——

408 Q. What is that?

A. I was going to say that every time we had meetings of the board, these gentlemen, who really controlled the board, would adjourn and leave me sitting sometimes alone there for an hour or two while they went off to have a private conference. I was not taken into the confidence of these gentlemen; I don't know what they did.

Q. But you were the president?

A. I was the president.

Q. The president?

A. Yes, sir.

Q. You have not yet said wherein you found anything wrong in regard to the statement which was to be submitted to the board of directors, and I would like you to do it. I want you to say where this company was injured and what was wrong about it; please state that, where the company was injured?

A. Well, Mr. Blanc, it is a long story.

Q. Just state it briefly?

A. Because the company was insolvent; was insolvent when I went there, and these things were to bolster up the solvency of the company by these returnings of stock to the company. The cost of the buildings, $850,000, was the first thing I noticed when I went there, which showed me that there was something wrong.

Q. Then after all you did not find anything wrong in the substitution of one balance-sheet for another, but you found you did not approve of the return of the stock to the company, is that what I understand, by A. C. Boyd?

A. I did not think it was an honest way of manipulating the books.

Q. Do you mean to be understood as testifying that the second

balance-sheet submitted to the board of directors did not state the facts with regard to the return of this stock?

A. Now, I cannot answer that question.

(Q. repeated.) Do you wish to be understood as testifying that the second balance-sheet submitted to the board of directors
409 did not state the facts with regard to the return of this stock?

A. Whether the stock was returned or not?

Q. Yes.

A. I have no personal knowledge that the stock was returned; I did not see it returned; I saw the resolution passed, but I did not see the actual transfer of the stock; I do not know of my own knowledge that it ever was returned.

Q. And you do not know that it was not returned?

A. No, sir; I do not know.

By Mr. BLANC: I give notice to counsel for the defendants to produce both these balance-sheets at the trial.

Q. Do you know whether or not Mr. Beamer was present at the meeting of the board of directors at which this resolution was adopted—at which this balance-sheet was submitted to the board?

A. Can I look at the book?

Q. You may look at the book, certainly.

A. At which the annual statement——

Q. At which this balance-sheet, referred to by you, was submitted, and a resolution adopted approving of it.

A. My impression is that it was. Mr. Beamer was at all the meetings. He was very punctual at all the meetings until he was taken ill.

Q. Your impression is simply derived as to what you remember as to his general conduct in relation to these meetings?

A. I do not remember Mr. Beamer being absent at any meetings while I was there, excepting the last one; he was ill the last meeting.

Q. When he was ill?

A. Yes, sir, the last one.

Q. Do you remember what time he was ill?

A. He was ill—it was in the winter some time.

Q. Are you willing to swear that Mr. Beamer was present at that meeting?

A. When the annual——

Q. I mean this meeting when this balance-sheet referred to by you was submitted and adopted. I ask you if you are will-
410 ing to swear that Mr. Beamer was present at the meeting?

A. He was, to the best of my knowledge and belief.

Q. I have not asked you to the best of your knowledge and belief.

A. To the best of my knowledge and belief he was present.

Q. Will you swear?

A. I won't swear. I will swear to the best of my knowledge and belief he was present.

Q. You will swear to the best of your knowledge and belief he was present?

A. Yes, sir, because the statement was presented at more than one meeting.

Q. Which statement was presented at more than one meeting?

A. The balance-sheet.

Q. This same balance-sheet?

A. Yes, sir; it was presented at more than one meeting.

Q. More than one meeting of the board of directors?

A. Yes, sir.

Q. For what purpose?

A. Well, to get ready to present it to the stockholders' meeting.

Q. Were you present at all of the meetings at which it was presented?

A. Yes, sir; I was.

Q. Can you state the names of the other gentlemen who were present at that time?

A. No, I could not; I could only say in a general way that a majority of the board was present, but I could not single out the names of the members.

Q. What were the dates of these several meetings at which this statement was presented, as near as you can get at it?

A. It was between the first of November and the first of January.

Q. 1892?

A. 1892.

Q. Between the 1st of November, 1892, and the 1st of January following?

A. Yes, sir.

Q. You say that you have known Mr. Beamer's handwriting; a number of these letters identified today were addressed to you from him?

A. Yes, sir.

411 Q. Some of them were not letters addressed to you?

A. Some of them were not.

Q. Those that were addressed from him to you, do they all concern the Pennsylvania Plate Glass Company matters?

A. Entirely?

Q. Altogether?

A. Altogether.

Q. They are not personal letters?

A. They are not personal letters; they were addressed to me as an individual, but on Pennsylvania Plate Glass matters.

Q. What I am getting at is whether the letters themselves concerned the business of the Pennsylvania Plate Glass Company?

A. Nothing else.

Redirect examination by Mr. SCHOYER:

By Mr. SCHOYER: I want to ask you a few questions, but I will suspend my examination until after lunch.

*William T. Woods Recalled.*

WILLIAM T. WOODS recalled on behalf of defendants.

Direct examination by Mr. SCHOYER:

Q. When you were on the stand last you stated, if I recollect aright, that the Lloyd's Plate Glass Insurance Company had purchased the ten bonds of $1,000 each of the Pennsylvania Plate Glass Company, through Mr. Beamer, the then president of the Lloyd's Company, with the understanding by your committee or board that you were buying directly from the Pennsylvania Plate Glass Company. Have you with you the minute book containing the proceedings in relation to that sale?

By Mr. BLANC: Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. Will you please produce it?

By Mr. BLANC: I object to it as immaterial and irrelevant.

412 (The witness produces the book.)

Q. What have you got there?

A. The minute book of the Lloyd's Plate Glass Insurance Company.

Q. What was the first proceeding?

By Mr. BLANC: I object to the witness reading anything from this minute book, on the ground that it is immaterial and irrelevant, and on the further ground that he has not been shown to have made the entries himself, or to be competent to testify as to the entries in that book.

Q. Mr. J. G. Beamer was then the president of your company?

A. Yes, sir.

Q. And you were the secretary?

A. Yes, sir.

Q. Whose duty was it to have the records made?

A. My duty.

Q. Now, read that part of it relating to this matter of the bonds, and the date of the meeting.

By Mr. BLANC: That is objected to as immaterial and irrelevant, and on the ground that the minutes speak for themselves.

A. There was a meeting of the finance committee on January 22d, 1891. I read from the minutes: "The president submitted a prospectus of the Pennsylvania Plate Glass Company and stated that the company had issued some bonds bearing interest at 6 per cent., and that it might be to the company's advantage to purchase some of the same;" then it was moved and seconded that $10,000 of bonds of the Pennsylvania Plate Glass Company be purchased, and that motion was carried. There was another meeting of the finance committee held on February 11th, 1891, and this appears in the minutes.

(Same objection.)

A. (Continuing:) Referring to the resolution passed at the meeting of the finance committee on January 22d, 1891, authorizing the purchase of $10,000 of the Pennsylvania Plate Glass Company bonds, the president stated that he had arranged with the
413 Pennsylvania Plate Glass Company for placing a certain amount of their bonds, in that it was agreed that the bonds should not be placed at less than par and interest, and that he desired to make that statement before purchasing the bonds." Then it was moved and seconded that the statement made by the president is satisfactory, and that the purchase be made. Carried.

Q. There was an inquiry, I believe you testified to the other day, into the action of the president, being then Mr. J. G. Beamer, in relation to these bonds, which you did not feel at that time able to tell us about. Have you got the proceedings of that meeting, at which such inquiry was made, with you?

By Mr. BLANC: Objected to on the ground that it is immaterial and irrelevant.

A. Yes, sir.

Q. Do you now recall the admissions made by Mr. Beamer in the course of that hearing in regard to the ownership of the bonds?

By Mr. BLANC: Objected to on the ground that it is immaterial.

A. Yes, sir.

Q. Do the minutes show those admissions?

A. Yes, sir.

Q. Please refer to the minutes, that part of the minutes which show those admissions.

By Mr. BLANC: Objected to as immaterial and irrelevant.

By Mr. BLANC:

Q. Were those minutes made by you?

A. No, sir; they were not made by me, but made by a stenographer, in my presence.

By Mr. SCHOYER:

Q. And accepted and adopted as part of the minutes?

A. Yes, sir.

By Mr. BLANC:

Q. You were present?

414 A. Yes, sir. This is a statement made by Mr. Beamer: "Before taking any action, I would like to say to this board that the statement that I bought $50,000 of the Pennsylvania Plate Glass Company bonds is true; that I sold to the Lloyd's Plate Glass Insurance Company $10,000 of those bonds at more than I paid for them is also true."

By Mr. BLANC: I move to strike that out as incompetent, immaterial and irrelevant to the issues in this case.

By Mr. SCHOYER:

Q. Mr. Woods, the check, I understood you to say when you were on the stand before, that was paid for those bonds at par and interest, was made payable to A. C. Boyd & Co.?

A. Yes, sir.

Q. And was cashed in your bank account and came back among your paid checks?

A. Yes, sir.

Q. You had seen that check how long before this hearing, before the matter of investigation came up?

A. Some months.

Q. Did you have occasion to look for it again after it came into your possession, and when this question of the investigation was under consideration?

A. I did.

Q. You found it?

A. No, sir.

Q. It was gone?

A. Yes, sir.

Q. Who had access to those checks beside yourself?

A. The officers of the company had access to it and the cashier had access.

By Mr. BLANC: That is objected to as immaterial.

Q. Who do you mean by the officers?

A. I mean the president; all the active officers.

Q. In the purchase of these bonds who acted on behalf of the Lloyd's Plate Glass Insurance Company in the actual transaction of purchase?

By Mr. BLANC: Objected to as immaterial and irrelevant.

A. I presume the president.

Q. Meaning Mr. J. G. Beamer?

A. Yes, sir.

415 Q. I asked you also the other day whether Mr. Beamer resigned from his office or failed to be re-elected at the next election; you declined to answer. I wish you to state now what the minutes show.

By Mr. BLANC: Objected to as immaterial and irrelevant, and also on the ground that the minutes speak for themselves.

A. He did not resign.

Q. Was the office vacated by him?

By Mr. BLANC: Objected to as immaterial and irrelevant.

A. The record shows he was removed.

Q. In consequence of this investigation?

(Same objection.)

A. In consequence of the investigation.

By Mr. BLANC: This is all subject to a motion to strike out the testimony of this witness as immaterial and irrelevant.

Cross-examination by Mr. BLANC:

Q. Mr. Woods, this check was drawn in the same way that other checks of this company were constantly drawn; was it not?
A. By the cashier?
Q. Yes; it was taken from the ordinary check book, I presume.
A. Taken from the ordinary check book.
Q. In which there were stubs?
A. Yes, sir.
Q. The stubs of those check books show precisely the nature of the check and the payee of the check; do they not, each check?
A. Yes, sir.
Q. And the stub from which this check was drawn shows that; doesn't it?
A. Shows that.
Q. Your company is still in possession of that stub?
A. Yes, sir.
Q. And has always been?
A. To the best of my knowledge it is in the possession of it.
Q. Don't you know that it has always been?
A. I do not know; I never saw that check book for some time, that old check book; I don't know.
416 Q. You do not know?
A. No, sir; I think we have that book, however.
Q. What is that?
A. I think we have it.
Q. You think you have it?
A. Yes, sir.
Q. Well, how did you come to know that this check was drawn upon the order of A. C. Boyd & Co., and the amount of the check?
A. Why, I signed the check.
Q. You signed the check?
A. Yes, sir, as secretary.
Q. As secretary?
A. Yes, sir.
Q. So that you were in possession of all the information with reference to that check, which you might have had had the voucher been in your hands?
A. I knew that the company had passed a resolution to buy the bonds.
Q. And you knew the check was drawn for the purchase of the bonds?
A. I knew the check was drawn for the purchase of the bonds.
Q. And the check was actually turned over to the parties from whom the bonds were bought?
A. I presume so.
Q. It was cashed and paid?
A. The check went through our bank.

Q. And you got the bonds?
A. Yes, sir.
Q. Have you still got the bonds?
A. No, sir.
Q. Sold the bonds?
A. Yes, sir.
Q. How much did you sell them for?
A. I think about sixty; not less than sixty and not over sixty-five.
Q. To whom did you sell them?
A. To a party in Pittsburg.
Q. What is his name?
A. I would have to refresh my recollection about that. I think his name was Noble. I think the party who negotiated with us for the purchase of the bonds, that his name was Noble.

(Recess to 2 p. m.)

417 CHARLES H. ADAMS continued.

Cross-examination by Mr. BLANC:

Q. I would like you to try and fix a little more definitely, if you can, the exact date when this second balance-sheet, to which you have referred, was submitted to the board of directors, as far as you are able to?
A. It must have been some time between the 1st of November and the 1st of January; that is as near as I can fix it; it must have been between the 1st of November and the 1st of January.
Q. You cannot say whether it was November or December?
A. No; I really couldn't say that at this late date.
Q. Now, this balance-sheet was the annual statement, was it not?
A. Yes, sir; but we had monthly statements besides.
Q. But this was the annual statement?
A. Yes, sir.
Q. And those annual statements were made from January to January, were they not?
A. I couldn't say, because I wasn't there all the time.
Q. Well, this particular statement?
A. You know by-laws were changed, and the election was changed.
Q. No; this particular statement; what year did that cover?
A. The year 1892, I think.
Q. Beginning with what date and ending with what date?
A. I should say from January to January.
Q. Now, you say that you saw both the first and second balance-sheets in question. What did you do with the first balance-sheet?
A. Personally?
Q. Personally.
A. Did nothing.
Q. Did it come into your hands?

A. No, sir; it didn't come into my hands.
Q. In whose possession did you see it?
A. I saw it in the possession of Mr. Cowen, the treasurer.
Q. It was drawn up by Mr. Zell, you say?
A. By Mr. Zell; yes, sir.
Q. He was the book-keeper?
A. He was the book-keeper.
418 Q. And the second balance-sheet also?
A. The second balance-sheet; yes, sir.
Q. Did you direct him to draw up the second balance-sheet?
A. I did not.
Q. Did you know that the second balance-sheet was to be substituted for the first one?
A. Yes, sir; I did.
Q. And you knew the reason why?
A. I knew the reason why. I might say that Mr. Cowen ran the financial part of the business.
Q. Mr. Cowen was the treasurer?
A. Yes, sir; and whenever he would come there he would go out and have conferences with Mr. Zell.
Q. Were you at the conferences with them also in connection with this particular matter?
A. At the meeting; yes, sir.
Q. And prior to the meeting, didn't you?
A. Of course I was there.
Q. You have stated that in the second balance-sheet which was submitted to the board of directors, and forms the basis of the resolution adopted, there appeared an item consisting of this $119,000 of stock returned by A. C. Boyd & Co., did you not?
A. Yes, sir.
Q. And that by the presence of that item the deficit which appeared on the books of the company was diminished in the statement; is that what I understand you to testify to?
A. That was their intention to do that but I claimed all along that it was irregular.

By Mr. BLANC: I move to strike that out as irresponsive.
By the WITNESS: It was irregular and dishonest. You couldn't strike out a deficit in that way.
By Mr. BLANC: I move to strike out the answer as irresponsive, and I ask to have the question read to the witness.

Q. (Question read.) And that by the presence of that item the deficit which appeared on the books of the company was diminished in the statement; is that what I understand you to testify to?
419 A. I say that that was their intention but I objected to it as being unfair and dishonest, and that the deficit could not be wiped out in that way.

By Mr. BLANC: I move to strike out that answer as being clearly irresponsive.

Q. Is that the best you can do in answer to that question?

A. That is the only way I can answer that question.
Q. You cannot answer it in any better way?
A. I don't know how to answer it any more truthfully than that.
Q. Now, please tell me how that item as to the $119,000 of returned stock figured in the statement submitted to the board of directors?
A. It was added to the stock in the treasury so as to make it appear on the general trial balance that the balance would be on the other side.
Q. It appeared as stock in the treasury?
A. As stock in the treasury.

Redirect examination by Mr. SCHOYER:

Q. The first balance-sheet showed a loss, did it not, in the operating of the works, of about $119,000 or $120,000?
A. Yes, sir.
Q. That loss, as I understand you to say, was wiped out by the showing on the second statement, by showing as an asset $119,000 or $120,000 of the capital stock returned to the treasury of the company?
A. Yes, sir.
Q. So that the affairs of the company then so far as the second balance-sheet was concerned, showed a profit from the operation of the company, whereas the first balance-sheet showed a loss of $119,000 or $120,000; that was the way of it, wasn't it?
A. That was the way of it.
Q. Well, is it possible that a return to the treasury of capital stock could actually wipe out a deficit in the running of the business itself?

(Objected to as calling for a conclusion.)

A. Most certainly not, it is contrary to all rules of business.
Q. Well, as matter of fact?
A. As matter of fact.
420 Q. Now then any person who was purchasing stock, or desired to purchase stock on the strength of the second statement would seem to be buying into a business that had been profitable to a small extent, whereas in point of fact the business was unprofitable and had shown a loss by the first statement of $119,000?
A. Yes, sir.
Q. And that is the reason you call it dishonest?
A. Yes, sir.
Q. Now, this happened between November and January, these two statements, but you cannot recollect distinctly when, but it was before the first of January, 1893, as I understand it?
A. I say we had monthly statements also.
Q. I am talking about these two balance-sheets?
A. The monthly statements also shows a loss, so we had it perpetually before our minds.
Q. Wasn't it in point of fact brought to your knowledge as presi-

dent that the concern was absolutely insolvent and always had been so?

A. No doubt about it; insolvent when I went there.

Q. In looking over the affairs of the company preceding the time you went there what did you discover?

By Mr. BLANC: Objected to as immaterial and incompetent, and that this witness was not then connected with the company.

A. I looked over the books and saw mostly all manufactured figures every place.

By Mr. BLANC: I move to strike that answer out.

Q. Did you discover whether or not that company ever had a working capital from its beginning?

By Mr. BLANC: Objected to as immaterial and irrelevant and also as incompetent, and that it calls for hearsay and improper evidence.

A. I am sorry to say I discovered it had not.

Q. How had the company found moneys to carry on the conduct of its business in the absence of a working capital?

421 (Same objection.)

A. In different ways, sir: by having notes discounted in the banks, and by mortgaging her future to pay the past, by selling our glass in advance.

Q. In advance of manufacture?

A. In advance of manufacture.

Q. And that was accomplished by way of par, or by way of rebates and discounts?

A. By way of rebates and discount.

Q. Can you state whether or not Mr. Beamer was fully advised on this subject?

(Objected to as incompetent and immaterial.)

A. Mr. Beamer knew more about it than I did a great deal.

Q. Did you ever have any talk with Mr. Beamer on that subject?

A. Many times.

Q. You have been examined about this resolution marked Defendants' Exhibit 101 and New York Defendants' Exhibit F, H. D. G., and I now hand to you three papers marked Defendants' New York Exhibit 29, and New York Defendants' Exhibit 30, being the second sheet of Defendants' New York Exhibit 29, and also Defendants' New York Exhibit 31, and ask you as respects 29 and 30, in whose handwriting the lead-pencil entries are and *as* respect to Exhibit 31 in whose handwriting that is?

(Objected to as immaterial and irrelevant.)

A. Exhibit 31 is in Mr. Beamer's handwriting.

Q. J. G. Beamer?

A. Yes, sir.

Q. And the lead-pencil entries on the other two?

A. That lead pencil is Mr. Beamer's.

Q. I now turn your attention to the proceedings of the special meeting of the stockholders of the Pennsylvania Plate Glass Company, held May 10th, 1893, on page 120 of Defendants' Exhibit No. 1, H. D. Gamble, examiner, and ask you whether or not
422 these Exhibits 29, 30 and 31 are the rough transcripts of those minutes? Compare them and see if they are not exactly the same, word for word?

By Mr. BLANC: Objected to as incompetent, and that the minutes speak for themselves, and also on the ground that the rough transcripts are not material or relevant.

A. With this intelineation of Mr. Beamer's these are the same.

Q. In the rough transcripts in whose handwriting are the words "Moved by Mr. Semmer, seconded by Mr. Hutkoff, it was resolved"?

A. In Mr. Beamer's handwriting.

By Mr. BLANC: I object of course to the witness making any statements with regard to the contents of these exhibits, as they haven't as yet been offered in evidence.

Q. "It is the sense of this meeting of stockholders that the directors add four grinding machines which are to be operated on the combination system of polishing, on condition that they can be built in ninety days, and payment made with this company's note distributed over a period of nine months, at a cost not to exceed $18,000, the machines to be erected, complete, including engines foundations and sheds." That is word for word isn't it?

A. Yes, sir.

Q. And the rough note is all in Mr. Beamer's handwriting?

A. It is all in Mr. Beamer's handwriting?

Q. Now, I am reading the next, "Moved by Mr. Harrison"——

A. "Moved by Mr. Semmer, seconded by Mr. Hutkoff," is the next "it was resolved that it is the sense of this meeting of the stockholders"—Oh, that is the grinding machine.

Q. "Moved by Mr. Harrison and seconded by Mr. Casey" whose handwriting is that in?

A. Mr. Beamer's. Mr. Stewart's name is stricken out, and he has written Casey over it.

Q. "It was resolved whereas prior to the 1st of January, 1893, the firm of A. C. Boyd & Co. paid back into this company shares of stock of the company to the amount of $119,000, and whereas
423 said stock has been paid into the treasury and cancelled, resolved that the stockholders of this company approve of the action of the directors and officers in accepting said stock in settlement with A. C. Boyd & Co." That is literally the same?

A. It is word for word.

Q. Now, then, I call your attention to Defendants' Exhibit No. 101, being also Defendants' New York Exhibit F, H. D. Gamble, and which you have already testified to as being in the handwriting

of Mr. Beamer, and which you said had been shown to you, and you had seen written, and which was presented to you before you retired from the presidency, and ask you whether—and about which you have been cross-examined about at length, and ask you whether that resolution or blank form is the same as what you have just been reading, and what appears on the minutes of May 10th, 1893?

A. I won't say since looking this over that this is the identical one that I saw then (referring to Defendants' Exhibit No. 101), but this I do say, that this was adopted before I went away from Irwin, this one (indicating).

Q. Which one?

A. This; this may be another copy, but the work was consummated and done so as to be put in our annual report. I won't say, however, that this is the identical piece of paper, but that action was taken.

Q. What I am asking you is whether what is on that paper is identical in substance with the later exhibits and the minutes?

A. It is identical in substance, yes, sir.

Q. Of course that is in the handwriting of Mr. Beamer?

A. It is in the handwriting of Mr. Beamer, but I won't say that this is the identical paper that I saw, it may be a copy of it, or it may be something similar to it; but that is the work that we accomplished while I was there. I cannot say what they done in May. It looks to me from the minutes there as though the minutes had been looked over, and they found that had been omitted and then it was written in in order to make the minutes correct.

Q. The point is you were speaking in your testimony-in-chief as to having known of the transaction before you retired, and
424 you were then asked to find it in the minute book, on cross-examination, and it was shown that it appeared in the minute book after you retired from the presidency.

A. Yes, sir.

Q. Now I hand you those minutes with the interlineation in the handwriting of Mr. Beamer, and that other exhibit which is wholly in the handwriting of Mr. Beamer, and I ask you if it relates to the same subject-matter?

A. It relates to the same subject-matter; yes, sir.

Q. Now, in the proceedings in the board you say you were often left alone while those who controlled the company went outside and then came back afterwards where you were left?

A. Yes, sir.

Q. I wish you would state whether or not in thus coming back the business had not been written up in your absence and presented to you, very often.

By Mr. BLANC: Objected to as not proper and as immaterial and irrelevant.

A. I wasn't absent.

Q. Do you understand the question?

A. You say in my absence?

Q. No, when you were left alone in the meeting-room, and these

gentlemen went out, they would come back with their business prepared?

A. Yes, sir, the business would be prepared and the resolutions would be all ready to be adopted by the board.

Q. And those were not prepared in your presence?

A. No, sir. I should say also that I could frequently hear loud voices and angry voices in the adjoining room while they were discussing these matters.

By Mr. BLANC: I move to strike that out.

Q. But you didn't hear what the subject of discussion was?

A. No.

Q. And so, while you were nominally president, you were——

A. I was virtually a figure-head; is that what you want to say?

425 Q. Yes.

A. Yes.

Q. In this exhibit, New York Defendants' Exhibit No. 4 for identification, the letter which you have identified as written by Mr. Beamer, dated August 5, 1892, to you, I wish you would state what is meant by the statement "Am also glad to hear you have retained control of the mix situation."

By Mr. BLANC: Objected to as immaterial, incompetent and also because the exhibit has not yet been offered in evidence, and that when it is it will speak for itself.

By Mr. SCHOYER: I now ask the witness not to answer the question until I make the offer of Defendants' New York Exhibit No. 4. I offer it in evidence.

By Mr. BLANC: I object to it as immaterial and irrelevant.

A. That was the secret process for manufacturing the glass which had been in the control of the superintendent, and the directors requested me to obtain possession of it, which I did.

Q. And among those directors was Mr. Beamer?

A. Mr. Beamer was the special one who urged me to get it.

Q. What is meant then also in this letter by this statement: "There can be nothing done as to Norman's salary. He is kicking because he don't get more, and at present has Cowen's ear and confidence to such an extent that the latter would resent any move in that direction, no matter how much he might apparently agree with you"?

By Mr. BLANC: I object to that because the exhibit has been read by the counsel in part and speaks for itself, and secondly I object to it because it is immaterial and irrelevant, and thirdly because this witness cannot explain what is meant by the language there in any other way than the language itself explains it.

A. I was specially instructed by the board to reduce everything there in the way of the running expenses of the works, and
426 discharge the chemist, who was getting $3,000 a year for doing nothing. He bought his stock on that promise that

he should have the salary, and Mr. Semmer's commission I was also ordered to cut off on all the sales, and Mr. Norman, as attorney for the company, was getting a salary, I think it was $1,800 a year, or something like that, and that was cut off, and Mr. Beamer thought it was not wise to do it at that time. Those were a few of the things. That is what he meant by that. We wanted to reduce the salary or cut it, and he didn't think it was wise to do it at that time.

Q. Why was it that Mr. Beamer feared the interference of opposition of Mr. Cowen to the reduction of Norman's salary?

By Mr. BLANC: Objected to because this witness is not competent to testify what Mr. Beamer's ideas were, except so far as they are expressed.

Q. If you know of course?

A. Not wishing to offend Mr. Cowen, who was a factor in the company, a great factor and on whom we relied for discounts and so on, and he did not wish to offend him.

Q. What also is meant in this letter by this sentence: "I hope you have not forgotten the terms on which the call for payment on the stock was to be made. A. C. Boyd & Co. were to pay back $25,000 in stock and reduce their notes by $15,000 when $75,000 of the preferred stock was subscribed for. It was agreed that they would be paid back *pro rata* if we went ahead on what we had subscribed."

A. That means just what it says.

Q. Preferred stock?

A. Preferred stock.

By Mr. SCHOYER: I now offer Defendants' New York Exhibit No. 9, H. D. Gamble, examiner, dated October 31st, 1892, in connection with the testimony of the witness.

By Mr. BLANC: I object to the admission of the letter on the ground that it is immaterial and irrelevant.

427 Q. Do you know anything about the affairs of the company being so involved during your presidency that conversations and consultations were had as to the propriety of applying for a receiver of the company?

A. Yes, sir.

Q. Did you have such conversations with Mr. Beamer?

A. Frequently; not only that but it is in one of those letters there.

Q. Do you know when a settlement or apparent settlement of the affairs of the company with A. C. Boyd & Co. was made, was it during your term or before?

A. I don't remember; we were continually having settlements with them and I don't know when the final settlement was, it was continually before us, the settlement question.

By Mr. BLANC: I might as well state now on the record that counsel for the plaintiff states that objection will be made to the admission in evidence at any time of any of these letters and exhibits referred to as Defendants' New York Exhibits, running from No. 1

to No. 31, as to which the plaintiff counsel would have had no opportunity to cross-examine this witness.

Q. I wish you would look at the cash book and ledger, the first entries, and state whether or not the erasures appearing on those books were there when you were president? Were the books in this condition when you last saw them *them* as president?

A. Yes, sir.

Q. Now, look at the cash book.

A. I looked over those and asked Mr. Zell how he got those figures.

Q. I don't care about that point. The point is——

A. Yes, I saw them just as you see them now.

Q. You are now looking at the cash book, Defendants' Exhibit No. 74, H. D. Gamble, examiner?

A. Yes, sir. You mean the top lines of this book, being the original entries.

Q. Those lines there (indicating on page 2 of Defendants' Exhibit No. 74)?

A. Yes, sir.

Q. I now show you Defendants' Exhibit No. 73, H. D. Gamble, examiner, page 2, being the ledger of the Pennsylvania Plate
428 Glass Company, and I ask were those red lines crossing out those entries there when you left; when you last saw the books, appearing on page 2?

A. Yes, sir, when I last saw the books they were.

Q. Now, turn your attention to the merchandise account on page 300 and the red lines erasing them, and I ask whether they were there when you retired from the presidency?

A. Yes, sir.

Recross-examination by Mr. BLANC:

Q. You have stated in answer to a question of the counsel for the defendants that you knew that this company was practically insolvent from the very beginning of your connection with it. Do you wish to be understood as making that statement?

A. I do.

Q. You did become president of this company and draw an annual salary of $6,000, did you not?

A. Yes, sir, the same as the superintendent drew, $6,000.

Q. So that you wish to be understood as stating that a company which you knew to be practically insolvent paid you an annual salary of $6,000 as president, and that you knowing that this company was insolvent accepted that office and that remuneration, do you?

(Objected to as not cross-examination.)

A. I do.

Q. You have stated in answer to a question put to you by the defendants' counsel that your position as president was simply that of a figure-head, is that correct?

A. Virtually, yes, as far as the finances were concerned. Of course I had a great many other duties to perform, trying to pull them out of a hole all the time I was there. Night and day I worked and travelled all the time trying to bolster up their credit.

Q. You were not a capitalist at the time you became president of this company?

A. No, sir.

Q. Can you give us any reason why this company should be anxious to have you as a figure-head in the office of president of this company?

A. I could tell you that.

429 Q. Well, I would like you to tell it.

A. You better not ask me that.

Q. I am not afraid of anything you say, sir. Of course if your answer isn't responsive I will certainly move to strike it out.

A. I took the presidency absolutely believing my friend Mr. Beamer, who at that time was my superior officer in another company, and he told me such plausible tales as to the bright prospects, and offered me $4,000 a year to go, which I wouldn't think of, and I told him I didn't want to go, I wasn't an available candidate, and after urging me to go, that he couldn't be promoted as president because Mr. Poole had failed, and that they hadn't any president, and that he couldn't think of any man that he would rather see there than myself, and I told him I wouldn't go, that I had my own business which was worth more than that, and which I didn't dare dispose of, and then he urged me to see the directors, and in the meantime raised the offer from $4,000 to $6,000, and I came to New York and met in his office some of the directors, and I declined to take the place, and I told them I was not an available candidate and Mr. Semmer, who was there then said you are the man we want, and I still declined to have anything to do with it, and they wanted to know if I would go out to the works and look them over, and I acceded to that, and that next night, I think, they all came to Philadelphia and I went with them to Irwin. The morning of the 6th of July, 1892, we landed there. I believe it was the day of the Homestead strike. I was greatly taken with the works, and on the strength of Mr. Beamer's statements to me that the second year I should have $10,000 salary, and the bright prospects and bright outlook there was for me, I in a weak moment accepted the presidency, and they assigned one share of stock to me. It was all done in a twinkling of an eye, and they sent the superintendent whose salary was also $6,000 to Europe; Mr. Boyd, they sent him away,

430 and Mr. Beamer told me afterwards that he lost his power and rank and salary, and that in the meantime I was to prepare a new constitution and by-laws while he was away. He was sent away with the idea that he was to look into the glass business of Europe, but they told me it was merely to get rid of him, so that when he came back he was reduced to $2,500, and his power taken away from him and his title changed from general manager to superintendent, and that was the way I went there to try and help them out and I would never have gone if it had not been for my

love and admiration for Mr. Beamer, and there was no other man in the world that could have induced me to go there but him.

Q. Do you still love Mr. Beamer so ardently?

A. I do not know what that has to do with this.

Q. Answer the question.

A. I have no dislike for Mr. Beamer, but I don't think Mr. Beamer treated me right. I think he took advantage of my friendship and put me in a tremendous hole. He got me in that position, and it was the worst position I was ever in in my life; I was never placed in such a trying position, and day and night I was bolstering up the credit of the concern, and all the time I was with them I lived on the hope of bolstering up our credit and going here and there, and I was always trying to raise money, and the $6,000 wouldn't pay a man for that, nor $60,000.

Q. Now, you have stated all that you have to state?

A. I have no ill will towards Mr. Beamer, no enemies to punish, if that is what you are driving at.

Q. You were then put to great straights to bolster up the credit of this company?

A. I was.

Q. And you exerted yourself a great deal to do it?

A. Yes, sir.

Q. I thought you testified before you had nothing to do with the finances of the company?

A. Except that I was president, and I felt a certain degree of pride in trying to bring it out on solid ground, that was all.

Q. Do you think that those are the duties of a figure-
431 head?

A. I say as to the financial part of the concern, I knew nothing of it. I didn't know we had any borrowed money from Mr. Cowen for months after I went there.

Q. Did you know that they had borrowed money from any other person than Cowen?

A. No—I learneds ome time after that, I think I learned that Mr Beamer had loaned them $5,000.

Q. When did you learn that?

A. Some months after that.

Q. After what?

A. After I was elected.

Q. What was the date of the election?

A. July 6th.

Q. What did you do to bolster up the credit of this company?

(Objected to as not cross-examination.)

A. I did everything that a man could do.

Q. Be good enough to specify some instances in which you bolstered up the credit of this wrecked company?

A. I came down to Wing & Evans, who had refused to trust us for any more goods.

Q. At what time was this?

A. This was shortly after I was elected president. I went out to

Grand Rapids about our plasterer; we had been giving them notes for plaster, and they refused to sell us any more and I went out there.

Q. This was shortly after your encumbency?

A. Yes, sir; and I went out there and I found that the men that were selling us plaster were old friends of mine here in New York State, where I had formerly lived, and on account of my personal relations they concluded to let us have more plaster.

Q. Is that the only instance you can refer to in which you bolstered up the credit of this company?

A. No.

Q. Suppose you relate a few more if you can.

A. I endeavored to sell the preferred stock to the best of my ability, but I very soon took counsel with some friends of mine in Philadelphia, and they told me it was a dangerous thing for me to attempt to sell that stock.

432 Q. But you endeavored to do it?

A. Yes, I did endeavor to do it.

Q. Of this insolvent company?

A. Yes, on the statement of Beamer and others that that would put us on our feet.

Q. Well, in spite of all the representations as to the superb future of this company, made by the directors, as you have testified, you knew that the company was insolvent before you took the office, or practically so?

A. Oh, no, not before I took the office.

Q. You have stated that you knew it was from the beginning?

By Mr. SCHOYER: Objected to as the witness has not stated that.

A. No, I couldn't have known it from the very first day. I intended to say that the company had been insolvent from the beginning. When I found $850,000 charged against the buildings, and I visited all the other plate glass companies, in company with others, the Howard Plate Glass Company for instance, which was a much better place than ours and cost only $300,000 to build, and which was a brick construction, and ours a frame one, and I saw there was a margin of $400,000 or $500,000 that couldn't be explained away.

Q. Did you know that before you became president?

A. No, Mr. Beamer was very careful not to tell me anything of that kind.

Q. You accepted the office without inquiry?

A. I took the word of a man that I would take no matter what he told me. Anything Mr. Beamer told me I placed implicit confidence in. I would no more doubt him than I would doubt what my father told me.

Q. And you also took what the other directors told you?

A. No, sir.

Q. You stated that you saw the other directors at the
433 time they were negotiating with you?

A. There was nothing said about finances.

Q. Did you see the works at that time?

A. Yes, sir.

Q. Have you not testified that you were very much taken with them?

A. I did, and I thought they looked very nice and very complete; with all those men at work it would impress any one; but it dawned on me, kept dawning upon me, how things were going, and I went to New York and told Mr. Beamer about it and spoke to him about a receiver, and he said he thought it would have to go into the hands of a receiver, and I thought I would be the receiver.

Q. That was when?

A. That was when I was president three or four months.

Q. Mr. Beamer advanced money to this company, did he not, and took notes?

A. I don't know of my own knowledge. I never saw the transaction.

Q. Now, will you kindly look at Defendants' New York Exhibit No. 9 and state whether or not that letter was sent to you by Mr. Beamer?

A. Yes, sir.

Q. Is there any statement in that letter to the effect that Mr Beamer had advanced money to the corporation?

A. That was the first I knew of it.

Q. Is there any statement in that letter is all that I am asking you? Read the letter from beginning to end.

A. "October 31st, 1892. Your favor of the 29th is at hand. I must acknowledge I was careless in not looking up the amount of the note, but taking it from memory. As it was the only note I have outstanding, I was a little careless about it as you suggest in your joke. I don't see what I have to do with Mr. Cowen in regard to vouchers being taken in payment of the note. I don't see but I am as much entitled to consideration as A. C. Boyd & Co. I gave this note as a matter of convenience to the company, and have been carrying their note for $5,000 for more than a year past at an
434 inconvenience to myself, so that A. C. Boyd & Co. may get their money. I don't propose now to put out any more money for their convenience, and you can either take up the note or let it go to protest, or do what you please with it. I have nothing whatever in return for it; the stock that was promised and agreed on has never been received and I have not had it for use as collateral, or any other purpose that I might need it for."

(Plaintiff's counsel informed the witness that he need not read the rest of the letter.)

By Mr. SCHOYER:

Q. Was there at any time any request made to you by Mr. Beamer about Mr. Olcott, the witness who was sworn here today being put, or not being put upon the auditing committee of the Pennsylvania Plate Glass Company's affairs?

A. Yes, sir.

Q. What was said?

A. Mr. Beamer requested me to appoint Mr. Olcott on the execu-

tive committee, and I did not know at that time that Mr. Beamer was an owner of bonds nor that he was in trouble with the Lloyds Plate Glass Insurance Company, and one evening at my hotel I had a telegram from him "Do not appoint Mr. Olcott on the auditing committee. He is my worst enemy," which was entirely an enigma to me, but the next day there was a letter from Mr. Beamer to explain what he meant by that.

By Mr. BLANC: I move to strike out the answer of the witness as not responsive, and also because it is incompetent evidence, as it states the contents of papers which could be produced.

Q. I now hand you New York Defendants' Exhibit No. 5, being a letter dated December 20, 1892, addressed to you, and signed by Mr. Beamer, and ask you if that is the letter referred to?
A. Yes, sir, that is the letter I received.

By Mr. SCHOYER: I offer that letter in connection with the testimony of the witness.

435 By Mr. BLANC:

Q. This letter which has been referred to as New York Defendants' Exhibit 5, appears to have been a personal letter from Mr. Beamer to yourself; is that a fact?
A. Yes; like many of the others, as personal letter as president.
Q. Does it say as president?
A. No.
Q. How is it addressed to you?
A. It is addressed to me, "Dear Mr. Adams," but it is on the company's business, nothing else but the company's business.
Q. On what sort of letter-head is it written?
A. The Lloyd's Plate Glass Insurance Company letter-heads, written from his house.
Q. Were you there when he wrote it?
A. I was not.
Q. Was he sick at the time he wrote it?
A. He says so there. I have a letter from his wife——
Q. He does say so?
A. He does say there he was bolstered up in bed.
Q. On what date was that?
A. December 20, 1892, and he refers to the telegram that he also sent me.

By Mr. BLANC: I now move to strike out all of the testimony of this witness as irrelevant and immaterial.

DECEMBER 21, 1897.

In pursuance of notice given by Mr. Schoyer to plaintiff's counsel, Mr. Schoyer now notified plaintiff's counsel that he will abandon his rule for taking testimony in Philadelphia, and will take testimony in Harrisburg, on Thursday, December 23, 1897, between the hours of 11 and 1 o'clock, at the office of the deputy secretary of the Commonwealth, at the capitol building, Harrisburg, Pennsyl-

vania; the testimony to be taken under the commission there to be confined to the authenticity of the signatures of the original paper on file in the office of the secretary of the Commonwealth, of which Defendants' Exhibit No. 8, H. D. Gamble, examiner, is a copy certified under the seal of the secretary of the Commonwealth.

436 HARRISBURG, PA., *Dec'r 23rd*, 1897.

And now, Dec'r 23rd, 1897, in pursuance of notice and adjournment, the further taking of testimony is proceeded with at the office of the deputy secretary of the Commonwealth at the capitol building, Harrisburg, Pennsylvania. S. Schoyer, Jr., appearing for the defendants, The Penn Plate Glass Co., and W. L. Kann, and no person present on part of the complainant.

*Testimony of Wm. C. Farnsworth.*

WM. C. FARNSWORTH, called by defendant and being duly sworn, deposes and says:

I am corporation clerk, and as such have possession and custody of the certificates and all corporation papers and records of the Commonwealth of the State of Pennsylvania.

Witness in pursuance of request now produces the original certificate of proceedings of an election held by the stockholders of the Pennsylvania Plate Glass Company, October 1st, 1890, for approval or disapproval of a proposed issue of $250,000.00 worth of bonds; the same having been filed in the office of the secretary of the Commonwealth on the 15th day of Dec'r, 1890, recorded in Miscellaneous Record Book, vol. 10, page 183, and states: This is the original certificate filed in said office in pursuance of requirements of law.

Q. Will you please examine Def'ts' Exhibit No. 8, H. D. Gamble, ex'r, being a certified copy under the seal of this office, and say whether said exhibit is a true and correct copy of the said original certificate filed in the office of the secretary of the Commonwealth and whether the said exhibit is the official certified copy of the original which you have produced on file in this office.

A. It is.

Q. Please state whether or not the original certificate now produced except name, number of shares, attestations, dates,
437 seal of the corporation, and the note respecting the remaining 3,268 shares appearing on the last page of the certificate, is not all in typewriting.

A. It is.

*Jas. W. Stoner Recalled.*

JAS. W. STONER, recalled by defendant deposes as follows:

Q. Have you examined the original certificate of bond issue election for approval or disapproval now produced by Mr. Farnsworth, the last witness, as the original of Def'ts' Exhibit No. 8, H. D. Gamble, ex'r?

A. I have.

Q. Have you heard the said original and the said Exhibit No. 8 compared?

A. I have and they are true copies.

Q. I now call your attention to the said original now on file and so produced and ask you if you know in whose handwriting the words "Attest A. Livingston Norman," to the extract from the minutes of the board of directors of the Pennsylvania Plate Glass Company of Oct. 1st, 1890, is, and if so in whose?

A. I do. That is the handwriting of A. Livingston Norman. I know his signature.

Q. Are you acquainted with the signatures of A. Livingston Norman, A. C. Boyd & Co., J. G. Beamer, George Cowen, C. W. Poole, F. Y. Klopfer and Daniel Harrison?

A. Yes, sir, I am.

Q. Look now at those signatures as they appear on the original certificates waiving notice by advertisement or otherwise of the meeting of the stockholders of the company to be held Nov. 15th, 1890, to take action on approval or disapproval of the increased indebtedness, and say whether the names of those parties attached to said waiver are their several genuine signatures.

A. They are except A. C. Boyd & Co., which is in the handwriting of Philip Semmer, a partner of A. C. Boyd & Co.

Q. Look at the signature of George Cowen to the affidavit verifying the list of stockholders and also the signatures of A. C.
438 Boyd, Philip Semmer and A. Livingston Norman judges, to their affidavit to perform their duty as judges, the signature of George Cowen to his statement to the said judges and his signature to his affidavit verifying his said statement and the signatures of A. C. Boyd, Phillip Semmer and A. Livingston Norman to their return of election, and the signature — A. Livingston Norman, secretary of said meeting, attesting a copy of the proceedings at said meeting, together with the handwriting to the following note appended thereto. "Note.—The remaining 3,268 shares were represented at above meeting, but could not vote, the stock having been acquired within sixty days. A Livingston Norman, secretary." And I ask you in whose handwriting the said note is, and in whose handwriting the several signatures mentioned in this question?

A. They are all the genuine signatures of the parties purporting to have made them.

Q. Do you recognize the corporate seal of the Pennsylvania Plate Glass Company as the genuine seal of said company?

A. I know it as an officer of the company it is the genuine seal and as receiver I now have it in my possession.

Adjourned to meet at Pittsburg, Pa., on notice to be given complainant's counsel.

H. D. GAMBLE, *Examiner.*

And now, to wit: January 13th, 1898, met pursuant to agreement at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; S. Schoyer, Jr., counsel for defendants.

Adjourned on account of the absence of Mr. Ferguson, of counsel for plaintiff, to meet Thursday, January 20th, 1898, at 10 o'clock a. m.

439 And now, to wit: Thursday, January 20th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; S. B. Schoyer, of counsel for defendants.

Adjourned on account of the absence of Mr. Ferguson, counsel for plaintiff, to meet Thursday, January 27th, 1898, at 10 o'clock a. m.

And now, to wit: Thursday, January 27th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; S. B. Schoyer, of counsel for defendants.

Adjourned on account of the absence of Mr. Ferguson, counsel for plaintiff, to meet February 3rd, 1898, at 10 o'clock a. m.

And now, to wit: February 3rd, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; S. B. Schoyer, of counsel for defendants.

Adjourned on account of the absence of Mr. Ferguson, to meet on Thursday, February 10th, at 10 o'clock a. m.

And now, to wit: Thursday, February 10th, 1898, met pursuant to adjournment at the office of H. D Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; S. B. Schoyer, of counsel for defendants.

Adjourned on account of the absence of Mr. Ferguson, to meet Friday, February 11th, 1898, at 10 o'clock a. m.

440 And now, to wit, Friday, February 11th, 1898, met pursuant to adjournment, at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble; J. S. Ferguson, of counsel for plaintiff; S. B. Schoyer, of counsel for defendants.

*Testimony of Mr. Allen Marthens.*

Mr. ALLEN MARTHENS, called on behalf of defendants and duly sworn, testified:

Direct examination by Mr. SCHOYER:

Q. Mr. Marthens. you are an expert accountant, are you not—professional accountant?

A. Yes. sir.

Q. What is your firm and place of business?

A. Marthens & Bacon is the name of the firm, and our place of business is the Fidelity building, Pittsburgh.

Q. You have examined the books, stock books and bank books of the Pennsylvania Plate Glass Company, have you?

A. I have.

Q. And you have made reports showing the issue of stock and the general position of the company as set forth in those reports, have you?

A. Yes, sir.

Q. Have you examined the books and the articles of association and the application for letters patent of the company, so as to enable you to state the number of shares subscribed for and who subscribed for them in that?

A. Yes, sir; I examined those papers.

Q. Who were the subscribers and what were the number of shares?

(Objected to by counsel for plaintiffs as incompetent and irrelevant under the pleadings.)

A. Wray E. Davis, New York city, 3,887 shares; A. Livingstone Norman, New York city, 10 shares; Daniel Harrison, Pittsburg, 1,226 shares; F. Y. Klopfer, Greensburg, 50 shares; C. W. 441 Pool, Irwin, 100 shares; Thomas McKie, New York city, 4,717 shares; John A. Norman, New York city, 10 shares; total, 10,000 shares.

Q. That made up the total authorized capital?

A. Capital of one million dollars.

Q. Mr. Marthens, that statement—that application sworn to by the treasurer, Cowen, shows that ten per cent. or $100,000 of the capital stock had been paid in on the date of the application. Can you state as a result of your examination whether that is true or not?

(Objected to by counsel for plaintiffs as incompetent and irrelevant.)

A. I find nothing to show that the 10 per cent. was paid in. The books are silent on that question. There are no entries whatever.

Q. It appears that on August 30th, four days after the letters patent was granted to this corporation, that 2,517 shares were issued to the following persons and in the following amounts: A. C. Boyd & Co., 1,500 shares; George Cowen, 1 share; F. Y. Klopfer, 1 share; Daniel Harrison, 1 share; C. W. Pool, 1 share; John A. Norman, 1 share; A. Livingstone Norman, 10 shares; and Wray E. Davis, 1,001 shares; Thomas McKie, 1 share; making a total of 2,517. I wish you would state where that stock came from, and how it happened that those shares were issued to these people when the articles of association show that the whole capital stock had been previously subscribed for?

(Objected to by counsel for plaintiffs as incompetent and irrelevant.)

A. Those shares were the very first certificates issued by the company. That is all I know about it.

Q. Were there any shares of stock issued—what I want to get at is how that stock could be issued, or how it appears on the books that they were issued, when the whole capital stock had been previously subscribed for.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

442 A. There was really none to issue, because the subscribers were entitled to the whole stock as shown by the application for letters patent, and there should not have been any stock whatever to issue to anybody else.

Q. Then you say as an expert that there was no stock in the treasury to issue?

A. No stock whatever; because it was all subscribed.

Q. Now, coming down to the meeting which authorized the issue of the $250,000 bonds in question here, and creation of the mortgage securing it on November 15th, 1890, I wish you would state how much stock was issued at that date.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. There was issued 2,519 shares, making $251,900 of stock, capital.

Q. What do you find the state of affairs to be in regard to the vote on the proposition to issue the bonds?

By Mr. FERGUSON: Without renewing the objection to each of the questions propounded or to be propounded to the witness, it is agreed that the depositions be taken subject to all legal exceptions; and it is particularly specified by plaintiff's counsel as the ground of exception:

First. That the evidence proposed is not matter of expert testimony; the books and papers of the company, if the testimony is relevant at all, being the best evidence.

Second. That the matters inquired about are not such defenses as can be set up by the answering defendants.

Third. Generally that the evidence is incompetent and irrelevant.

By Mr. SCHOYER:

Q. Before you answer that last question, I wish you would state, Mr. Marthens, whether the books of this company are in such a condition that any intelligible examination of them can be
443 made, or any intelligible results arrived at, without an expert inquiry?

A. No; they are not in such condition. It is necessary to go through other papers in addition to the books in order to arrive at anything intelligible at all of what is contained in them.

(Question read by stenographer as follows:)

Q. What do you find the state of affairs to be in regard to the vote on the proposition to issue the bonds?

A. I find that the vote in detail as shown by the return of the meeting filed in the office of the secretary of the Commonwealth, meaning the meeting of November 15th, as filed in the office of the secretary of the Commonwealth, December 15th, 1890, was as follows: A. Livingstone Norman, 10 shares; John A. Norman, 10 shares; A. C. Boyd & Co., 1,500 shares; George Cowen, I share; Wray E. Davis, 3,835 shares; C. W. Pool, 100 shares; F. Y. Klopfer, 50 shares; Daniel Harrison, 1,226 shares; making a total of 6,732 shares of which 2,519 were issued and 4,213 were unissued.

Q. In effect, the vote on the proposition to issue the bonds was with the entire authorized capital, less some 3,268 shares which had been transferred within sixty days and couldn't be voted?

A. Yes, sir.

Q. Was the list that you have given attested by the treasurer as correct as shown by the stock ledger?

A. It was.

Q. So that at the time that this issue of bonds was authorized, there had been issued $251,900 of the total capital stock. Was that stock paid for according to the books?

A. It was according—no, not according to the general books, but it was according to the entries in the stock ledger, and under the terms of a certain contract with A. C. Boyd & Co. whereby they were to get 1,500 shares for certain construction.

Q. Of course, what you say in regard to the payment is subject to what you have said before as to the fact that there was no
444 stock in the treasury to issue to A. C. Boyd & Co.?

A. No, none to issue at all; that there was no stock transferred from the subscribers to A. C. Boyd & Co.

Q. And how many shares of stock did you find were issued to A. C. Boyd & Co.,—that is, that got into their possession somehow?

A. Altogether, or just on that date, August 30th?

Q. Altogether.

A. I find that there were 4,305 shares issued to that firm altogether.

Q. And how much in dollars?

A. $430,500.

Q. Did you find on the books or in the papers any transfer from the original subscribers of this stock to A. C. Boyd & Co., or to anybody else?

A. Yes, quite a number of transfers from A. C. Boyd & Co.

Q. To A. C. Boyd & Co.?

A. No, sir; I don't find any transfers at all.

Q. Now on December 18, more than a month after this meeting authorizing the bond issue, were there any releases by the board of directors of the original subscribers from their stock subscriptions which had been shown to be subscribed for in the articles of association?

A. There were as follows: Wray E. Davis, 6,050 shares; Daniel Harrison, 1,225 shares; a total of 7,275 shares, representing $727,500.

Q. And therefore that stock appears not to have been paid for?

A. No, sir.

Q. By the subscribers?
A. It was never paid for by the subscribers.
Q. And were there ever any certificates for that stock issued?
A. No, sir.
Q. So far as appears from the books?
A. The books don't show any.
Q. From your knowledge and experience as a book-keeper, Mr. Marthens, should not the general books show all the details and facts in connection with the stock and cash transactions, names of the subscribers and the amount subscribed by each?
445 A. Yes, sir; there should be a full description on the books from the time the company was incorporated, giving all details of sales of stock and payments upon the same and transfers.
Q. And do the books, as a matter of fact, show such a state?
A. They do not show it.
Q. Now the bonds were all taken by A. C. Boyd & Co., were they not, on their building contract?
A. Yes, sir.
Q. How much do you find to have been paid to Boyd & Co. in cash up to August 1st, 1891?
A. $819,500.
Q. How did you get at that?
A. That is just shown by one cash entry in the cash book under date of July, 1891.
Q. What page?
A. As shown by page 7 of the cash book.

(Witness refers to cash book, page 7.)

Q. Is the statement made up not only from the books, but from checks drawn on the Farmers' & Miners' deposit bank to the order of A. C. Boyd & Co.?
A. Yes, sir.
Q. Do or do not the books of the company show that they represent as liability not the amount of stock paid in, but the total authorized stock?
A. They represent the total authorized stock.
Q. It would appear from this, would it not, that the whole capital stock was represented as having been paid in?
A. That would be the effect of the books, as representing the total liability, the total authorized capital as having been paid in.
Q. And that you find, as you stated, on the cash book, page 7?
A. On that page we only find that $60,700 was paid in up to that date.
Q. Mr. Marthens, on December 1st, 1892, it appears by the books that the company had suffered a net loss of $119,488.98, does it not?
A. Yes, sir.
Q. How did they attempt to wipe that loss out?
A. They attempted to overcome that loss by transfer from certain holders of certificates to the company of $120,000 of stock which was credited to profit and loss.

446 Q. And they thus assumed to wipe out the loss which was shown by the books?

A. They did.

Q. Would it have that effect?

A. No, sir.

Q. Why not?

A. Because stock can't possibly be a profit to the company by transfer from any of its stockholders.

Q. Then, as a matter of fact, the company was insolvent at that date?

A. It was.

Q. The capital stock of a corporation has no connection with their commercial transactions, has it?

A. No, sir.

Q. That is, the state of the capital-stock account would not at all show their actual financial standing in regard to their commercial transactions?

A. No, sir; not at all.

Q. What could the purpose of such a transaction as that be?

A. The purpose would be to deceive the stockholders by showing that the company was prosperous when it was losing money and had steadily lost money up to that date.

Q. The fact would be that it would conceal the fact that there had been actual losses?

(Objected to by counsel for plaintiff as leading.)

Q. Would or would not that transaction conceal the fact to any one investigating that such a loss had occurred?

A. It would conceal the actual state of affairs, unless an examination was made of the books. A thorough examination by somebody who was familiar with book-keeping entries would discover that that was for the purpose of concealing the true state of affairs.

Q. I show you, Mr. Marthens, the Defendants' Exhibit 21, which shows on December 31st, 1893, a net profit of $25,177.83. Now, could such a state of affairs as that have been shown unless they had concealed this loss of $119,000?

A. No, sir; it could not.

Q. Or could they in reality have made such a profit as that considering the condition in which the company was the year
447 previous, having a loss of one hundred and nineteen and some thousand dollars?

A. It is not likely that they could have made such a profit; in fact, it was impossible, as the company showed a steady loss up to the time that stock was sold.

Q. And do the books show that they made any money afterwards, between that date and December 31, 1893; and in this connection I ask you what you find the total debt to be on January 1st, 1894?

A. From my examination of the books, there was no money made up to or from the transfer of the $120,000 of stock back to the company up to January 1st, 1894, at which date the total net debt of the company was $457,239.49.

Q. How long after the incorporation of the company, Mr. Marthens, were the books of this company opened?

A. About one year or eleven months.

Q. That is August 1st, 1891, then?

A. Yes.

Q. And on that date, it is a fact, is it not, that the books showed that they had received the cash as follows, namely: From the bonds, $250,000; and from the sale of 6,077 shares of stock, $607,700; making a——

A. Yes, sir; making a total of $857,700.

Q. And what disbursements?

A. The disbursements which were entered on the same date were as follows: Commission for negotiating loan of $250,000 to A. C. Boyd & Co., $12,500; A. C. Boyd & Co., $819.500; expenses, $25,582.47; a total of $857,582.47.

Q. Leaving a balance of how much?

A. Leaving a balance on August 1st, 1891, $117.53.

Q. Are there any items or details as to what that $25,000 of expenses consist of?

A. No, sir; not any.

Q. Well, now, as an expert, Mr. Marthens, what can you say of this method of book-keeping? Was it a proper one or not?

A. It was very improper and very suspicious.

Q. Mr. Marthens, you have made a statement from the books showing the common stock issued to January 1st, 1894, showing the date, to whom issued, the number of the certificate and number of shares and the amount; and also a statement of the common stock issued up to August 1st, 1891. I show you those statements and ask you if they were made from the books of the company and if they are correct?

448

A. They were made from the stock books of the company, and are correct as shown by those books.

Q. You have also made a statement from the books showing the account of A. C. Boyd & Co. with the Penna. Plate Glass Company?

A. I have.

Q. Is that a correct transcript from the books of original entry of the company?

A. That is a correct statement as shown by the books.

Q. Now, Mr. Marthens, according to this account, how much money did A. C. Boyd & Co. get?

A. $890,652.98.

Q. Now this appears to be cash, does it not?

A. According to the books it appears to be cash, all except ten notes aggregating $40,780.24. I believe those notes were paid afterwards, though I forget now.

Q. So that would represent all cash?

A. Yes.

Q. Well, then, this cash appears to be in addition to the stock and bonds which they received, does it not?

A. Not necessarily, because they have put in all the stock that was issued as having been paid for in cash, and then made them

entries to show what had been disbursed, just as though they had actually been cash transactions. The bonds are represented in the cash book as having been sold and the money received.

Q. Look at the ledger, Mr. Marthens.

(Ledger examined by witness.)

By Mr. FERGUSON: If Boyds took stock at any time, they are credited with paying cash for it, then they were charged back with cash when they drew it out under their contract.

By Mr. SCHOYER:

Q. There is nothing on the face of the books to show, is there, that these payments to Boy & Co. of $890,000 were other than cash?

A. No, sir, nothing.

449 Q. And that they had been paid that much in cash as far as the books go. So that, so far as would appear at any time from looking at the books, Boyd & Co. had been paid so much in cash?

A. In cash; yes, sir.

Q. And so far as the books are concerned, it is also the fact, isn't it, Mr. Marthens, that the bonds appear to have been paid for in cash?

A. That is right.

By Mr. SCHOYER: Here in connection with the testimony of the witness I offer in evidence the statement showing the common stock issued up to August 1st, 1891; the preferred stock up to January 1st, 1894; and the common stock issued to January 1st, 1894; and the account of A. C. Boyd & Co. with the Penna. Plate Glass Co., fastened together and identified as Defendants' Exhibit No. 107.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

By Mr. SCHOYER:

Q. Mr. Marthens, taking the books of the company from August, 1890, up to December 31st, 1893, do they show that the company was at any time solvent between those dates?

A. They do not.

Q. What do they show?

A. They show that it was insolvent.

Q. Do or do not the general books properly exhibit the cash receipts and expenditures between the date of the incorporation, August 29, 1890, and August —, 1891, at which latter date stock to the amount of $607,700 and bonds to the amount of $250,000 are alleged to have been sold in cash and entered in lump sums?

A. There is no account whatever to show any cash transfer between those dates.

*P.* And you can't tell whether any stock and bonds were sold for cash and to whom?

A. I cannot.

Q. In regard to the item on page 7 of the cash book to which you have been referred, where you show the amount of cash from the

sale of bonds and stock amounted to $607,000, making a total
450 cash amount of $857,700, out of which the commission was paid to Boyd, and the $819,000 were paid to them, making a total disbursement of $857,582.47, and showing the balance of $117.53. At the time of making that entry did you have or were you furnished with the details and items which make up the amounts of these receipts and expenditures or did you make the entries as they stand on the books?

A. They were just taken from the books.

Q. Does it appear whether any account was kept in detail of the cash transactions by anybody prior to August 1st, 1891?

A. There was no detailed account kept.

Q. Now, in the deposit book of the People's national bank, under date of August 12th, 1893, the sum of $9,941 is entered as a deposit, being the proceeds of a $10,000 note which was discounted. Do those proceeds appear to have been entered in the cash book as a receipt?

A. I think I know what you have reference to, but I haven't my original memorandum.

Q. What is your recollection?

A. My recollection is that it was not entered in the cash book. I couldn't find any entry whatever of the proceeds. The discount was charged up.

Q. Can you explain that?

A. No, I can't explain that. The money, it seems to me, should have been entered upon the cash book for the benefit of the company. The discount appeared upon the cash book, and the proceeds should appear there also.

Q. It appears by your statement, Mr. Marthens, that up to April 1st, 1893, dividends amounting to $1,901.68 were declared, of which $917.79 was paid. Was the business of the company or the affairs of the company at any time, from your investigation, such as would warrant the payment of any dividend?

A. No, sir.

(Objected to by counsel for plaintiff as irrelevant and incompetent and asking an opinion of the witness that he is not warranted in giving.)

451 Q. You have already said that the company showed a steady loss.

A. The company showed a steady loss and showed a large net loss up to that date.

Q. Now, on your report showing the common stock outstanding up to January 1st, 1894, it appears that 4,952 shares were outstanding at that date after deducting the stock surrendered by A. C. Boyd & Co., 1,200 shares, on December 22, 1892. Was or was not that the same amount of stock that was outstanding on January 1st, 1893, and was there any additional stock issued during the year?

A. That was the same amount outstanding January 1st, 1893, and no additional stock was issued in the meantime.

Q. And was any of the surrendered stock reissued?

A. No, sir.

Q. You do not include in this statement the 1,000 shares which the stub of the certificate shows were issued to George Cowen, treasurer, November 29, 1891?

A. No, sir; that is not included.

Q. Was that ever returned?

A. There is no cancelled certificate to show in the records.

Q. You have made a statement in regard to the stock-subscription accounts, Mr. Marthens. Was that statement correctly made from the books?

A. Yes, sir; from the stock ledger.

Q. And that shows, does it not, that on August 1st, 1890, that Wray E. Davis is charged with his subscription for 3,887 shares, and on November 10, with 3,216 shares transferred from Thomas McKee, which makes a total of 7,103 shares, and he is credited on August 1st with the payment in cash for 1,001 shares, also to one share transferred to George Cowen, and on November 5th, with 50 shares transferred to J. G. Beamer, and on the same date with 1 share transferred to George F. Huff, and that he is also credited with the release of 6,050 shares, and his account is balanced?

A. Yes, sir; that is what my statement shows, which balance is the original subscription.

452 Q. You have also made a statement of the superintendent and office account of the Pennsylvania Plate Glass Company, showing the payments made on that account, and showing the salaries paid to these various people. Is that account correctly made from the books?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. Yes, sir.

Q. That office account shows that Mr. Beamer was under salary, does it not? I call your attention to the item of November 30th showing the salary paid to J. G. Beamer, $3,494.14, amongst other items.

A. Yes, sir; he was on a salary there.

In connection with the testimony of the witness counsel for defendants offer in evidence the stock subscription and accounts and the superintendent and office accounts referred to by the witness, and marked Defendants' Exhibit No. 108.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

Q. Mr. Marthens, I wish you would state from the statements made by you what the total net debt of the Pennsylvania Plate Glass Company was on January 1st, 1894.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. The total net debt of the company on that date was $457,239.49.

Q. Then, in the light of that state of facts, is the statement contained in Defendants' Exhibit No. 21, showing a net profit of $25,177.83, correct?

A. No, sir.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

Cross-examination by Mr. FERGUSON:

Q. What do you mean by saying there was no stock to issue on the 30th day of August, 1890?

A. It was all subscribed.

453 Q. Then it was there to be issued when paid for, wasn't it?

A. It belonged to the subscribers.

Q. Of the stock issued on that date, 1,001 shares were issued to Wray E. Davis, and he was a subscriber for more than that amount, wasn't he?

A. That stock was issued on August 30th, 1890. Yes, he was a subscriber; that was part of his subscription.

Q. And there was a share issued each to Pool, Thomas McKie, John A. Norman, Daniel Harrison, F. Y. Klopfer. They were each subscribers for more than that number of shares, weren't they?

A. Yes, sir.

Q. Now, did you trace up to find where the A. C. Boyd & Co. 1,500 shares came from?

A. It was issued as original stock by the company.

Q. Where did the one share issued to Cowen come from?

A. That was issued as original stock.

Q. Are you sure of that?

A. No; I am mistaken about that. I haven't got a copy of this statement; that was assigned by Wray E. Davis to George Cowen.

Q. Now all of the shares issued on that date, unless we pass for the present the 1,500 shares to Boyd & Co., were paid for in cash, weren't they?

A. Well, I don't know; the records don't show it. There are no details of the cash receipts at all.

Q. Well, suppose you take the stock ledger and see whether they aren't.

A. The stock ledger isn't a cash record.

Q. Haven't you, in one of your exhibits, credited Wray E. Davis with cash for 1,001 shares?

A. Well, yes; I have.

Q. And haven't you in Exhibit No. 107?

A. Well, just wait a minute. I am not sure about that. I have but I got that information from the back part of the stock ledger, not from the cash book. This is a copy of the stock subscription docket.

454 Q. Haven't you, in the paper offered this morning as Exhibit No. 107, purporting to show in detail the stock issued to August 1st, 1891, tabulated the names of the parties to whom the

stock was issued, the number of shares issued to each of the parties, and ascertained that the sum total was 6,077 shares, or $607,700, and haven't you verified that as the details of the entry on the cash book of the $607,700?

A. The aggregate corresponds with the cash entry, but I couldn't say whether it all came from stock.

Q. Look at this exhibit before you answer (Exhibit No. 107 shown witness) and just remember you are not testifying from your knowledge. You are testifying from what you found in these books. Don't you find that that detailed statement, Exhibit No. 107, makes up the aggregate of the subscription entry of the $607,700?

A. It corresponds with the amount of that cash entry, but the cash entry does not seem to be correct, because 1,500 shares of that stock apparently was issued to A. C. Boyd & Co., on their contract for certain construction, and therefore wasn't a cash transaction.

Q. What difference does it make, as a matter of fact, if A. C. Boyd, being entitled to receive 1,500 shares on their contract, the entry would be cash for 1,500 shares from A. C. Boyd & Co., then a charge back to A. C. Boyd & Co. of 1,500 shares on their contract, what difference would it make?

A. It would make no material difference, except as a matter of book-keeping.

Q. You discovered in the course of your examination that on August 30th, 1890, there was a contract between the firm of A. C. Boyd & Co. and the Pennsylvania Plate Glass Company for the erection of certain work and the conveyance of certain realty for an aggregate sum of $850,000, did you not, a portion of that consideration to be paid in stock and a portion in cash, the contract referred to being Defendants' Exhibit No. 11?

A. Yes.

455 Q. And it is on the date of that contract that this 1,500 shares was issued to A. C. Boyd & Co. that you have referred to, isn't it?

A. Yes, sir.

Q. And the contract itself calls for $100,000 to be paid in cash and $150,000 in stock on delivery of deed, contract, franchises, etc.?

A. Those are the first two payments.

Q. On the delivery of the contract?

A. Yes.

Q. Therefore, the issuing of that 1,500 shares of stock, or the amount of stock called for by the contract, appears to be cotemporaneous, that is, the date of the issue of the stock is the date of the execution of the contract?

A. Yes, sir.

Q. Now you discovered that a certificate of stock had been issued to Cowen, treasurer, for 1,000 shares, or $100,000 of the stock, didn't you?

A. Yes, sir.

Q. You say you haven't taken that into consideration at all?

A. I haven't.

Q. Now can you tell me how much stock there was issued in addition to the 6,077 shares that you have spoken of?

A. There was 75 shares issued afterwards.

Q. To whom?

A. Of common stock.

Q. To whom?

A. To William E. Kelly, trustee, 15 shares; Philip Semmer, 14 shares; A. C. Boyd, 20 shares, and George Cowen, 25 shares; C. H. Adams, 1 share, making 75 shares in all.

Q. Is that all paid for, or does it appear to have been paid for?

A. The 15 shares issued to William Kelly, trustee, were for second payment on account of contract of $6,800, as shown by journals folio 59.

Q. Contract with him, was it?

A. I presume so.

Q. Paid for, then, in that way, was it?

A. Paid in that way.

Q. How about the balance?

A. The shares issued to Phillip Semmer, A. C. Boyd and George Cowen were charged to the superintendent and office account as stock taken in settlement; and the one share issued to C. H. Adams doesn't seem to have been paid for.

456 Q. That is to say, you found no evidence of payment on the books?

A. No evidence on the books.

Q. I understand you to say that the books purport to show that the whole capital was taken and issued?

A. The books show that it was subscribed for.

Q. That we have in the articles of association; but I understood you to go further and say that it showed that it had been issued.

A. Oh, yes; they purport to show that.

Q. Who was the balance of the stock issued to? We have got 6,152 shares. Now, where are the other 3,848?

A. The books purport to show that it was issued by representing as a liability the whole authorized capital stock of one million, but it has not all been issued.

Q. How much of it has actually been issued?

A. In addition to the common stock there has been 404 shares preferred stock, aggregating $40,400.

Q. Well, how much of the common stock in all was issued?

A. Common stock issued was $615,200.

Q. Did you find that any of the common stock had been changed in any way from subscribed stock to treasury stock?

A. Yes; I found that 1,200 shares were surrendered.

Q. I didn't ask you that. I asked you first whether you found it had been changed from common stock to treasury stock.

A. Yes, sir; I did.

Q. How much?

A. 1,200 shares, aggregating $120,000.

Q. That is the stock that you criticise as being used to reduce the apparent loss, is it?

A. It is to wipe out the actual loss.

Q. Well, the actual loss of one hundred and nineteen odd thousand dollars which you speak of was reached by carrying as an apparent liability one million dollars of stock, was it?

A. That wouldn't make any loss, no matter how much stock was carried. It wouldn't make any difference in the loss or profit.

457 Q. Why?

A. Because the capital doesn't enter into the business, the mercantile business of the company.

Q. Isn't the usual way of making a statement of a matter of this sort to treat as a liability the entire capital stock and other liabilities on one side, and on the other put the assets, including, if there be any, unpaid subscriptions?

A. It is not the usual way. It is the way with a great many concerns.

Q. Isn't it a very common way?

A. It happened quite frequently sometimes. The proper way is to represent the actual amount of the capital paid in as a liability.

Q. Did you ever see a bank statement in your life that wasn't made in that way?

A. The treasury stock isn't always worth anything.

Q. I am coming down to the treasury business afterwards. You have been shown Exhibit No. 21, and you have been asked whether the apparent profit shown there of $25,177.83 was an erroneous showing. I want you to look at that and I'll ask you whether it don't carry as a liability a million dollars of capital?

A. It does. (Exhibit 21 shown witness.)

Q. Look at the other side. It shows real estate, buildings, etc., and it shows the treasury stock, common and preferred, as an asset, doesn't it?

A. It does.

Q. Now, where is your statement by which you reach the conclusion that there was a loss of one hundred and nineteen thousand dollars? Have you made up any such statement as that?

A. I haven't made a statement showing that loss. I haven't made any separate statement showing that loss, but the books will show that by taking the profit and loss account.

Q. Let me have your statement of the fixed and floating debt. You have taken as the fixed debt this $250,000 mortgage, haven't you?

A. Yes, sir.

458 Q. And what have you found the floating debt to be according to your examination? You have taken as the fixed in*in*debtedness the mortgage of $250,000, and the floating debt you ascertained by your examination to be how much?

A. The floating debt I ascertained to be $263,713.99, less certain available assets, including the inventory of goods, the whole amounting to $56,474.50, or a net floating debt of $207,239.49.

Q. Making a net indebtedness, then, of how much?

A. $457,239.49, January 1st, 1894.

Q. Now, in another of your exhibits here, after referring to the

returned or surrendered stock, amounting to $120,000, you found the net amount of common stock outstanding to be $495,200, didn't you?

A. Yes, sir.

Q. Adding to the liabilities you have already given, would make a total of $952,439,49, would it not?

A. I didn't give you a statement of liabilities. It was the total net debt I gave you.

Q. I know you did. You gave me a total debt of $457,299.

A. The stock is only a debt to the stockholders, not a debt of the company.

Q. Isn't it a liability, in ascertaining the net value?

A. It is a liability, but it is not a debt.

Q. I understand that, but it is treated as a liability for that purpose. In other words, what I want to get at is this. If you take this fixed indebtedness of $250,000, and you take that floating debt that you have given me, and what has been paid in as capital stock, then you have got what it cost the company to get the assets it has, no matter what it may be, haven't you?

A. The difference between the whole amount of the capital and the assets ought to represent net assets or net debt. In this case it represents a net debt.

Q. We'll get at it another way. The real estate is there—the buildings and all that?

A. Yes, sir.

Q. Well, according to this Exhibit No. 21, that was carried
459 into the assets at $846,800. I suppose you don't know anything about the value, do you?

A. No, sir; I don't.

Q. Assuming that this is correct, that would stand as an asset, wouldn't it, $846,800?

A. Yes, sir.

Q. I also find that there was an improvement account carried as an asset, amounting to $51,901.21. Did you carry either of those items or any part of it, into the available assets that you deducted?

A. No, sir.

Q. Well, don't you find this, at least, from the books, that there appeared to be assets consisting of real estate, machinery and buildings amounting to $846,800, improvements, $51,901.21, and other assets as on that day, January 1st, 1894, amounting to $56,474.50, making a total of assets amounting to $955,175.71, and that the liabilities, consisting of common and preferred stock, bonds payable and indebtedness owing to other parties in bills payable and accounts payable, etc., making a total of $1,490,013.99, leaving a liability over assets of $93,838.27. That would show the net loss, wouldn't it?

A. No, sir.

Q. Isn't it a fact, Mr. Marthens, that if you treat the capital stock at par, and you have assets enough shown by the books, you knowing nothing to the contrary, to account dollar for dollar for the stock

and dollar for dollar for all the liabilities, that you then have the condition of affairs in which there is no apparent loss, haven't you?

A. In business we must except the plant in figuring at the loss,—you must except your plant and all fixed assets because in making a settlement of your indebtedness you can't use—you don't want to go into your plant in order to get the money. You want to get what is available, such as cash and accounts.

Q. This money that was paid to Boyd (turn to the ledger account Exhibit No. 73), that account shows that the contract that I have already referred to between the company and Boyd has been paid in full, doesn't it, $850,000?

A. It does.

460 Q. So that, whether that was done by the delivery of actual cash, or the delivery of stock or the delivery of the proceeds of the mortgage involved in the case, this company actually had a contract fulfilled for which it had agreed to pay $850,000, and there is no apparent liability for any proportion of that? Isn't that so?

A. No; except that the bonds——

Q. I mean to Boyds. I don't mean on the bonds, of course.

A. No; that is, as shown by the books, there is no apparent liability.

Q. Could you tell from the Boyd account what went to make up the $850,000?

A. There is nothing shown by the account to represent how it was made up.

Q. Can you tell me how much cash this company got from the stock issued other than that issued to the Boyds? You have stated already that you have an account with Wray Davis showing, apparently at least, that he paid in $100,000 in cash?

A. That account, Wray E. Davis, is not taken from the cash book. It is only an entry on the stock ledger which represents that it had been paid in, but there is nothing in the books to show——

Q. You haven't the slightest doubt, have you, that this item on the cash book is made up of the details shown in Exhibit No. 107?

A. The entry corresponds with the sum of that stock, but that is as far as I know.

Q. By that exhibit, if you add to it the 75 shares that you have spoken of, and deduct $430,000 that appears to have come from Boyd & Co. in some way, you would have $185,200 of cash coming from other sources, wouldn't you?

A. Where do you find that?

Q. I find in this exhibit that Boyd got stock, $150,000, twice $100,000; $55,000 and $25,000. I made a mistake of $500. That makes $184,700.

A. You are only speaking about the common stock, are you?

Q. Yes.

A. Now let's see if I understand you. You ask for the amount of cash?

461 Q. Well, I'll put it this way: First, I'll ask you whether this preferred stock, $40,200, that you speak of, was ever taken or paid for, apparently, so far as you could discover?

A. So far as the books are concerned, if I remember right, it was paid for. It was all issued. It showed according to the books it was paid for.

Q. Now, then, according to that, up to date, prior to the return of this $120,000 of stock, the company would appear by the way in which its books were kept to have got in cash or its equivalent $40,400 for the preferred stock?

A. It appears here $40,200.

Q. Well, then, say $40,200; it would appear to have got from Boyds as the equivalent of cash $430,500, and from those other parties $184,700, making $655,400. It appears to have paid the Boyds the contract price in full of $850,000. Was that $120,000 charged for by the Boyds in any way when it was returned, or does it appear to be simply a discount deduction made on their account?

A. You ask if it was charged to them?

Q. I mean did they appear to have got anything for it?

A. The books don't show anything received for it.

Q. Therefore, it would seem to be a return, a voluntary return of that much stock, wouldn't it?

A. It would.

Q. And that would be more fully apparent because, if you added it to the total of $665,400 which I have given you, there would still appear only to have been—rather, if you deduct it from the $850,000, there would only appear to have been paid them $730,000, with $655,400 to pay for it, isn't that so as a matter of book-keeping?

A. That would be the appearance of the matter—that if they would give $120,000 that they would be suffering such a loss; but they were not credited with the amount returned as shown by the books.

Q. Weren't they charged up with it?

A. They were charged up with it when they got it, but when they returned it they were not credited with it.

462 Q. Their stock account was credited with what they got?

A. The stock account was credited, but the treasury stock was charged—no, I don't mean to say that. You have reference to the $120,000.

Q. Whatever Boyds got in stock their stock ledger showed a credit for whatever they got?

A. For whatever they got, yes.

Q. And when they returned this 1,200 shares then their stock account was charged with it and their holdings were reduced just that much?

A. Accordingly, yes.

Q. Have you been able—no matter who returned it, your exhibits of course, will correct that—no matter who returned that stock, taking this contract, have you been able to ascertain how, unless there are some omissions in this book against the company, not by way of trickery, have you been able to ascertain how they were able to discharge a contract of $850,000 with the cash and proceeds of this mortgage and other assets that came in?

A. Well, with the proceeds of—they had sold $655,400 of stock.

Q. That includes $430,500 of stock that Boyd & Co. got?
A. Yes, that includes all. Then the mortgage of $250,000.
Q. That would make $905,400. You have stated, as I understand you, that there was nothing to show that the 10 per cent. was paid in on the date of this organization. Haven't you got to take in $100,000 to make it work out at all, and don't that account for the Cowen, trustee, certificate?
A. What was the date of that certificate?
Q. The date of the organization, August 30th.
A. That would account for it.

(Hearing here adjourned until 2 o'clock same day.)

463 *Afternoon Session.*

ALLEN MARTHENS recalled.

Redirect examination by Mr. SCHOYER:

Q. Mr. Marthens, in regard to this loss $119,000 which was covered by the surrender of $120,000 of stock. Had that loss anything to do with the capital stock?
A. No, sir.
Q. What was the nature of the loss and how did it arise?
A. The loss had no connection whatever with the capital stock. It was simply a loss in the natural order of business for which the company was incorporated. It represents the difference between the amount realized from the sale of the company's product, less the expenses of the company.
Q. It was, therefore, entirely in the operating department?
A. Yes, sir, and represents the net loss in the business.
Q. And then at that time the company was insolvent?
A. It was.
Q. Then how could that loss be wiped out by the surrender of this 1,200 shares of stock?
A. It could not be wiped out by the surrender of any amount of stock.
Q. Is it not a fact that when capital stock is once sold it belongs to the person to whom it is sold?

By Mr. FERGUSON: I object to that question for the reason that the witness is neither a lawyer nor a judge and has no business to express an opinion.
(Question withdrawn.)

Q. But is it the fact that this loss is simply a matter of book-keeping and due to the fact that the whole capital stock authorized was charged as a liability, whether issued or not? I will explain. Mr. Ferguson has tried to make it appear that this was not an actual loss at all, but that it was simply due to the fact that, as a matter of book-keeping, the company had charged up the whole authorized capital stock whether issued or not, as a liability,
464 and that that being the case, that the surrender of this 1,200 shares of capital stock would even matters up and wipe out

the loss. In other words, that it wasn't an actual loss at all, but that it was simply a matter of book-keeping.

A. No; it was an actual loss, and this surrender of that amount of stock or any other amount would not wipe it out, no matter what the actual loss was expressed at on the books. That was a loss in the operating department, as we have already said, of the business.

Q. A loss in actual money?

A. In actual money.

Q. Now, Mr. Marthens, in regard to the surrender of this stock, was it the stock of A. C. Boyd & Co. which was surrendered to wipe out this?

A. No, sir; there were only 95 shares surrendered by A. C. Boyd & Co.

Q. And by whom were the others surrendered?

A. The remainder of the stock was surrendered by the following parties: George Cowen, 250 shares; A. C. Boyd, individually, 125 shares; George Cowen, 200 shares; Catherine Evans, 25 shares; Philip Semmer, 504 shares; John L. Redinger, 1 share; which, with the 95 shares previously mentioned as being surrendered by A. C. Boyd & Co., makes a total of 1,200 shares.

Q. I understand you to say that, prior to the time—to August 30th, when A. C. Boyd & Co. got this 1,500 shares of stock, that according to the books, all the stock had been subscribed for by other parties?

A. Yes, sir; under date of August 1st, 1896.

Q. And that $100,000 appeared to have been paid or was alleged to have been paid upon the stock so subscribed?

A. Yes, sir.

Q. Does there appear on the books any transfer of that stock from the original takers to A. C. Boyd & Co.?

A. There are no documents to show any transfers, and no stock could be transferred because certificates had not been issued yet for it. There does appear a transfer of 1,500 shares to A. C.
465 Boyd & Co., as shown by the stock ledger, but that does not express—that is no evidence of its being a transfer. That was transferred, I think, according to the figures, from Wray E. Davis.

Q. Then the situation was that this stock had been subscribed for by the parties who purport to have paid $100,000 for their subscriptions?

A. Yes, sir; the stock was subscribed by the parties shown by the application for letters patent.

Q. Did, then, the company have any stock to issue to A. C. Boyd & Co.?

A. No; they had none to issue. It was all subscribed for and practically owned until,—it was waiting for the time to be issued to them.

Q. Is there anything on the books to show that any of these original subscribers paid for that stock, further than the entries on the stock ledger?

A. No, sir; none whatever.

Q. Is there any credit of cash on the cash book for this stock?

A. There is not a single entry showing any money received from the sale of stock prior to August 30th, 1891.

Q. Is there anything in the books to show that if this money had actually been received by the company what became of it?

A. Nothing prior to the entry of July, 1891, which shows that $819,500 was paid to A. C. Boyd & Co.

Q. That was one lump entry?

A. Yes; one lump entry.

Q. I understand you to say that, from the organization of this company in August, 1890, until the first of August, 1891, there were no books kept at all?

—. No, sir; there were none that I saw. I got all the books that I understood existed and come into use.

Q. The books that you got purport to be opened August 1st, 1891?

A. Yes; August 1st, 1891.

Q. Mr. Marthens, can you now give a statement showing the amount of stock, bonds and cash received by A. C. Boyd & Co.?

A. Just want it in round amounts, do you?

466 Q. Yes; according to that little statement you showed me just now.

A. In round numbers the figures are as follows: Stock, $430,500; cash, $169,200; bonds, $250,000; total, $849,700.

Cross-examination by Mr. FERGUSON:

Q. The company appears to have released Wray E. Davis from 6,050 shares, doesn't it?

A. Yes, sir.

Q. And it appears to have released Daniel Harrison from 1,225 shares, doesn't it?

A. Yes, sir.

Q. Well, then, without reference to any legal question, it apparently had at least 7,275 shares to dispose of after those releases?

A. After December, 1890; yes, sir.

Q. Now, it is a fact, isn't it, that the first 1,500 shares that A. C. Boyd & Co. got were assigned out of the Thomas McKie subscription, isn't it?

A. Yes; as shown by the stock ledger.

Q. In other words, the McKie stock was transferred to Wray E. Davis, wasn't it?

A. I believe so.

Q. All except one share?

A. I believe so. 3,216 shares of the McKie stock was transferred to Wray E. Davis.

Q. Out of Wray E. Davis' account, then, was 1,500 shares to A. C. Boyd & Co. on August 30th, 1890?

A. Out of Wray E. Davis, no sir. According to the stock ledger it was assigned from the Thomas McKee estate, and it was not transferred to Davis.

Q. Then I am mistaken. That much was from McKie then?

A. Yes.

Q. And the balance of the McKie went to Davis?

A. Yes; except the one share which was supposed to have been paid in cash.

Q. Now, then, there was abundance of stock in the hands of the company, leaving aside any legal question, to issue the balance of the $430,500 of stock to Boyd, wasn't there? The balance less this $150,000?

A. It would appear so.

467 Q. You have spoken about this loss of $119,000. That loss had been re-cuped to the extent of $26,000 before the first of January, 1894, hadn't it, so far as the books show?

A. So far as the books show, it had.

Q. And the facts are that the books show that the real estate, buildings and machinery under the Boyd contract were delivered to this company and fully paid for to the extent of $850,000, and that $51,000 or thereabouts had been paid for in the shape of further improvements, isn't that so?

A. Yes; according to the entries in the books it would appear that was.

Q. You stated on cross-examination this morning, did you not, that the gross floating debt of the Pennsylvania Plate Glass Company on January 1st, 1894, was $263,713.99?

A. Yes, sir.

Q. And that the bonded indebtedness was $250,000?

A. Yes, sir.

Q. Making a total of $513,713.99?

A. Yes, sir.

Q. You also stated that there were quick assets amounting to about $56,000?

A. $56,474.50.

Q. And you have the buildings, machinery and real estate invoiced at $850,000, or thereabouts, haven't you?

A. $846,800.

Q. And you have the improvements amounting to $51,901.21?

A. Yes, sir.

Q. That makes assets then of $954,957.21 to meet liabilities of $513,713.91, or, as you figure it, $955,175.71, don't it?

A. The assets that you name are correct, but what you name as liabilities represents the total debt instead.

Q. Well, I say so. The total debt as you state it is $513,713.99, isn't that so?

A. That is right.

Q. Do you undertake to say that a company that has assets of that amount and liabilities of that amount is insolvent?

A. I do for this reason: On the face of the papers and books,
468 the total debt given there of $513,713.99 should have the amount of paid-in capital added to it, aggregating $535,300, which would make the total liabilities $1,049,013.99, from which, if we deduct the total assets, will show that the company is insolvent to the extent of $93,838.28.

Q. Yes; but you wouldn't have it that way this morning. Now

I am for your sake leaving aside the capital stock, and I am putting you this question. Taking the liabilities outside of the capital stock at the figures that you have named, and the assets at the figures that you have named, so far as creditors were concerned, at least this company would have over $440,000 to the good, wouldn't it?

A. That was assuming——

Q. Leaving aside the question of capital stock and speaking simply with reference to creditors?

A. Looking at it in that light and the assets representing their book value, there would be enough to wipe out that indebtedness.

Q. And leave that much more?

A. Yes.

Q. Over $440,000?

A. Yes, sir.

Q. And that would apparently stand as the value of the paid-in capital as given by you of $535,300?

A. Yes.

Q. Now you have stated that the first books that you saw dated in August, 1891. From whom did you get the books?

A. I got those books from Mr. Kann.

Q. Did you ask anybody as to whether there were any memorandum books prior to that time or not?

A. I did. I asked Mr. Kann and one or two attaches of his office. All the persons that I knew had any connection with it.

Q. Outside of Mr. Kann and his immediate employees you asked nobody?

A. No, sir.

Q. And you don't know whether or not there were any memorandum books prior to the opening of the books?

A. I do not.

Q. Do you know as a matter of fact that this corporation was organized in August, 1890—the 26th of August, and that its
469 plant was some considerable time in building, and that no business was done until about the 1st of August, 1891?

A. I don't know anything about that.

Q. Do you know the fact that in 1893 there was a great depression of business?

A. I have heard so.

Q. Do you know the fact that that is the date at which you say there was a deficiency of $119,000—in 1892 and 1893?

A. That deficiency of that amount was on December 1st, 1892, I believe; but the deficiency continued right straight along.

Q. But recovered itself to the extent of $26,000 before the first of January, 1894?

A. It did up to that date.

Redirect examination by Mr. SCHOYER:

Q. Mr. Marthens, in regard to this apparent excess of assets over liabilities, in order to make good Mr. Ferguson's assertion, the com-

pany would have had to wind up business, would it not, and convert those assets?

A. The company would have had to wind up its business and dispose of its plant and go out of business entirely. The usual order of things in any business is to convert only the quick or available assets for the purpose of paying off its indebtedness, leaving the plant intact, which couldn't be done in this case.

Q. And, assuming that they had not disposed of their plant or converted these assets which I understand were integral and essential parts of the plant, necessary for its operation, the assets were not equal to the liabilities?

A. The assets were not. They would have been very far short.

Q. Will you state what the quick and available assets were, the bills receivable, accounts receivable, merchandise and all that, and as against that, what their bills payable, wages, etc., were, and from that state whether or not the plant could have continued?

(Objected to by counsel for plaintiff for the reason that the witness is not competent to express an opinion.)

A. The inventory of merchandise and other items aggre-
470 gated $40,401.82; cash on hand, $1,386.15; accounts receivable, $11,346.46; bills receivable, $2,065.36; a total available assets of $55,199.79, which deducted from the total debt of $513,713.99, leaves a net debt of $458,514.20, which would have to be paid by converting the plant into cash and discontinuing business.

Q. Now, deduct from that the fixed indebtedness—the mortgage indebtedness?

A. Deducting the bonds, $250,000, leaves a net floating debt of $208,514.20.

Q. So that in any event: in order to realize the amount of assets, it would have been necessary to sell the plant and discontinue business.

(Objected to by counsel for plaintiff, first, that the question is leading; and, second, that the witness has not shown himself competent to express any such opinion.)

Q. And that the validity of that statement as to the excess of assets over liabilities depends, of course, on the plant's realizing the face value,—those assets realizing the face value on sale?

A. Yes.

Q. This deficiency,—when did it take its inception,—this deficiency of $119,000; that is, relative to the commencement of business?

A. It took its inception from the beginning of business,—from November 19th. That seems to be the first entry, which was a loss of $36,000.

Q. And continually increased?

A. Continually increased.

Q. Now, when that deficiency apparently is reduced some $26,000 *in* January 1st, 1894, is it not a fact that that reduction would depend very largely on the correctness of the inventory?

(Objected to by counsel for plaintiff as leading and incompetent, particularly to this witness.)

A. It would depend a great deal upon the prices at which goods were inventoried.

Cross-examination by Mr. FERGUSON:

Q. Have you any knowledge—do you know anything
471 about the prospects of business which this company had in January, 1894?

A. I don't.

Q. Do you know anything about its banking facilities?

A. No, sir.

Q. And yet you feel justified in saying that a corporation that had $440,000 excess of assets apparently would be compelled to quit business and sell its plant in order to pay its debts. Is that your position?

A. That is my position from the standpoint of a book-keeper.

Q. And yet you don't know as a book-keeper hundreds and hundreds of cases of the same sort, where the business is continued and prosperously continued?

A. I only know that in any kind of business that if the indebtedness cannot be paid out of its available assets, the company is in bad shape, and if the indebtedness must be paid, it will be necessary to convert the plant and equipment into cash.

*W. L. Kann Recalled.*

W. L. KANN, codefendant, recalled.

Direct examination by Mr. SCHOYER:

Q. You are one of the defendants in this case, are you not?

A. Yes, sir.

Q. And you were the purchaser of this property at the receiver's sale?

A. Yes, sir.

Q. You were a creditor of this concern, were you not?

A. Yes, sir.

Q. When did you become interested in it and advance money to the concern, and how much?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. I became a creditor of the Pennsylvania Plate Glass Co. in December of 1893, and advanced them further moneys in January and February of 1894.

Q. Before you advanced the money or became interested in
472 this concern, were you given a statement by the officers of the company purporting to show the financial condition?

A. Yes, sir; I was.

Q. I show you Exhibit No. 21, and ask you if that was the statement which was given to you.

A. Yes, sir; besides that they had me go to the property, look at it, and made a number of statements outside of this written one.

Q. It was, in part, was it, or was it not in part in reliance upon this statement, Exhibit 21, that you were induced to advance your money and become interested in the company?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. Yes, sir; it was upon that statement and the other favorable statements which were made by the officers and interested ones in the company which were made to bear out this written statement.

Q. What was the general effect or substance of those favorable statements as bearing on the solvency or insolvency of the company?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. They claimed that they were in a flourishing condition—that they were making money, and had made money during the year 1893, notwithstanding that they had a prolonged strike, and prospects of business were very good.

Q. But outside of that, did or did not they make any representations as to the cost of the plant, etc.?

A. Yes, sir.

Q. What were those representations?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. They stated that their plant cost $850,000. Do you want me to go into the full particulars of it?

Q. I just want to get at as to the value of the plant.

A. Well, they represented to me that their plant cost them $850,000 and was worth it.

473 Q. Then you became interested in the company and advanced them money. Was that money ever repaid?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. On the strength of that statement I did become interested in the company and was elected an officer of the company, and upon assuming office—I accepted the position predicated on that statement in open meeting that if that statement was true and they could substantiate it that I would accept the position which they had elected me to—as treasurer of the company, and if, upon examination of their books, which I asked ten days' time to do, if the examination proved that that was true I would accept. If not, I would decline to accept the position.

Q. And you did subsequently accept?

A. I did accept the position under protest, they claiming that they

had then an offer to sell out one-third of the controlling interest in that plant for a very large sum of money, and they pressed me to take no arbitrary steps until they could consummate that, when they would relieve me of the position and pay me back the money which I had advanced.

Q. Was Mr. J. G. Beamer an officer of the company at that time?

A. Yes, sir; he was vice-president of the company and was present at the meetings when I made this statement and was elected.

Q. And was George Cowen?

A. Yes, sir; Cowen was the treasurer.

Q. A receiver was subsequently appointed to take charge of this property by the courts of Westmoreland county, was it not, upon a bill filed by George Cowen *et al.?*

A. Yes, sir.

Q. Were you at all connected with that motion for the appointment of a receiver as plaintiff in any way?

A. No, sir, I was not at all connected with it.

Q. And you subsequently purchased the real estate at the receiver's sale, did you not?

A. Yes, sir.

474 Q. And turned that property over to the Penn Plate Glass Company, which was subsequently organized, in payment of your capital stock—partially, any way?

A. I bought that property at the receiver's sale. It had no connection with what I did. I went to the sale and bought it. I was a creditor of the company at the time. I subsequently formed a corporation known as the Penn Plate Glass Company and sold them the property.

Q. So that the Penn Plate Glass Company was not the purchaser at the receiver's sale from the Pennsylvania Plate Glass Company?

A. No, sir; the Penn Plate Glass Company bought the property from me as an individual, and I bought it at the receiver's sale.

Q. Was the order of court for this sale read at that sale?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. Yes, sir; the order of court under which the property was sold was read at the adjourned sale and at the sale that I bought it.

Q. Was there any agreement by you with Mr. Stoner, express or implied, or with anybody else at that time, or at any other time, that you would buy subject to the judgment of this mortgage, or that you would assume the payment thereof, or that it was to be part of the purchase-money?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. By Mr. Stoner, I suppose you mean Mr. Stoner, the receiver?

Q. Yes.

A. No, sir; there never was any arrangement or understanding or any discussion of that kind, or anything that bore on that subject. To the contrary, I bought the property on the order of court, which stated that the property would be sold subject to the lien of the mortgage.

Q. Did you buy with any understanding or agreement with
475 anybody that the amount of that mortgage was to be part of the purchase-money?

A. No, sir; never had any such understanding.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

Q. At the time of this sale you were a judgment creditor, were you not, of the company?

A. Yes, sir; I was.

Q. Mr. Kann, I wish you would state what additions or improvements or betterments you or the Penn Plate Glass Company have put upon this property since the sale to you.

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. During the time I had owned the property myself, and afterwards when it came into the possession of the Penn Plate Glass Company, up to three or four months ago, we have spent about one hundred and eighty-five to two hundred thousand dollars on the property.

Q. In what way?

A. For betterments, additions, constructing of a water plant, the erection of a gas plant, and adding thereto of additional machinery in order to complete the plant, had to buy additional ground in order to put these constructions on. When I obtained possession of the property I found that it was in an incomplete state and not capable of producing anything like the amount of product which they claimed it would. In fact, it couldn't be operated at all in the way that it was then constructed. Not enough finishing machinery, wasn't enough boiler capacity nor engine capacity. The natural gas had given out and no provisions had been made to use fuel in the plant. When we attempted to burn crude oil, the insurance companies wouldn't insure the property if we continued it, and I was put to the necessity of putting in a fuel plant.

Q. What did it cost you?

A. Well, the gas plant cost, I suppose, in the neighborhood of $25,000, probably more than that, but at least $25,000. I have got the items.

476 Q. I wish you would specify if you can and describe definitely the permanent structures or betterments that you put upon the land which were not there at the time of the receiver's sale.

A. I started to construct and have since completed a water plant. The plant required a great deal of water in its operation, and the only source of supply was the local company there which wouldn't

guarantee them a supply at all, and what they did at a very high price, and several times in the history of the company before I got hold of it, they had to shut down entirely for the want of water. One of the first things I did was to construct a water plant. That plant cost in the neighborhood of $40,000, and, as I stated before in regard to the fuel, fuel was a very large item there. In fact, the plant couldn't operate without having a fuel of some kind.

Q. What was the nature of it?

A. Manufactured gas, called a producer gas plant. It manufactured gas out of coal.

Q. Can you give approximately the value of that?

A. The plant itself cost somewhere in the neighborhood of $25,000. It and its attachments into the building would cost all of $50,000. We had to put on additional boilers. There wasn't sufficient boiler capacity there to run the plant. We put on an addition to the casting hall. That is the part of the plant in which you cast the glass, both in buildings and in the kilns. I had to reconstruct all the furnaces as they had been built for natural gas, and natural gas had all given out, and we had to put in fuel furnaces. We put in one-third increase in the polishing machines, and about one-third increase in the grinding machines. Had to put new roofs over most all the buildings, railroad switches in order to handle our material, etc.

Q. Then, in general, what is the cost and value of the improvements and permanent betterments which you placed upon that property after the sale to you?

A. About $200,000.

477 Q. Mr. Kann, was this company solvent on the 31st day of December, or the first of January, 1894?

(Objected to by counsel for plaintiff as irrelevant and incompetent.)

A. Since I had an opportunity to examine the books and affairs, which was shortly after the 31st day of December, 1893, and during January, 1894, I discovered that they were not solvent—to the contrary, that they were insolvent, and at that time I had evidence that they had always been so from the inception of their business, and that is one reason why I immediately offered the resignation of the office which was tendered me.

Q. Is it a fact that the deficiency of $119,000, existing prior to January 1st, 1894, was in fact reduced to $93,000 as claimed?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. From my own knowledge, gained since that statement was given to me, I don't think that they ever reduced it any. I think that their indebtedness was increased.

Q. Do you know whether or not the inventory upon which that alleged profit or reduction was made was a correct one?

(Objected to by counsel for plaintiff as incompetent and irrelevant.)

A. I know that it was not a correct and true statement so far as the inventory was concerned.

Q. Mr. Kann, you have had experience in the construction and remodeling of glass plants, have you not?

A. Only this one. I have knowledge of the construction of other plants, but I was not a party to them.

Q. Are you familiar with the requirements and the elements which are necessary in the construction of a glass plant and the cost of such construction?

A. I am.

478 Q. And from such knowledge and experience, for how much do you think the plant of the Pennsylvania Plate Glass Company, as it originally existed, could have been erected?

(Objected to by counsel for plaintiff, first, that the witness has not shown sufficient knowledge to entitle him to express an opinion as to the elements entering into that cost under the contract with Boyd & Co., already in evidence; especially, that the proposed evidence is incompetent and irrelevant.)

Q. I wish you would state, Mr. Kann, before you answer that last question, whether you investigated the subject of the cost of the Pennsylvania Plate Glass Company plant and found out what it was.

A. I did very thoroughly.

Q. What did you do?

A. I took the necessary steps to get at their subcontractors' bids at which they erected this plant for A. C. Boyd & Co., and we proved—(interrupted) I ascertained from all those contracts also the work that Boyd & Co. did themselves. I had at least two disinterested estimates made on the cost of constructing the plant as it stood at the time that I bought it at the receiver's sale by competent builders, and I had besides that a constructing engineer go over the plant in detail, he calling two assistants, people in the various branches of business that would necessitate the building of the different parts of the works, and had him make a written statement. I did that at the instance of the people who subsequently became interested in the new corporation to show them what the plant actually was worth.

Q. Did you have data before you from which to inform yourself as to what Boyd actually did pay for the construction of the plant?

A. Yes; more or less.

Q. You are familiar with the practical operation and the cost of erecting a glass plant such as this was, now?

A. I am familiar with the practical operation of a plate-glass plant because I have managed that plant ever since it has been

479 operated, since I bought it from the receiver and since it has been a corporation, and am now president and manager of that company and operate it. I have knowledge as to what it costs to build a plant, which I have gained in connection with the business, and from the various estimates which I have had made on

that plant, and from the estimates which I now have for the erection of an entirely new plant.

Q. Then from such knowledge and experience, I wish you would state what in your opinion it would cost to build such a plant as that of the Pennsylvania Plate Glass Company at that time.

(Objected to by counsel for plaintiff for the reasons, first, that the witness has not shown such a knowledge as entitles him to express an opinion; second, that he himself shows that the knowledge he has is largely hearsay; and third, that the proposed evidence is incompetent and irrelevant.)

A. I think. The plant of the Pennsylvania Plate Glass Co. to begin with, was an incomplete plant, and whatever value it did have as of its construction would be very much depreciated from the incomplete shape it was in at the time that I became the owner of it. Outside of that I don't think it cost to construct over $300,000.

Q. In your opinion, could it have cost anything like $850,000?

A. Practically impossible; and it never did cost anything like that.

Cross-examination by Mr. FERGUSON:

Q. Mr. Kann, you began your connection with this company in December, 1893, by loaning it some money?

A. Yes, sir.

Q. How much did you lend them?

A. The first money I loaned them I discounted a note of $3,500 for them.

Q. Next?

A. I'll have to get the records to show that. I loaned them entirely $42,500 between December and February. I loaned them $42,500.

Q. Was that the note of the company or was it business paper of the company—any part of it?

480 A. $3,500, the first money which I loaned them, was the note of the company endorsed by their directors, or most of them. The balance of it was money which I lent them in cash on their promise to deliver to me, and they did deliver to me, judgment notes of the company.

Q. Well, your answer may cover it, but I asked you whether any portion of it was business paper?

A. No; none of it. The only business paper was the company's paper of $3,500.

Q. By business paper I mean bills receivable—customer's paper.

A. None of that.

Q. Did you acquire any stock in the company at any time?

A. One share of the stock of the company was assigned or issued to me which I never paid for.

Q. That was transferred to you by whom?

A. I don't know. I think it was either Mr. Cowan or Mr. Semmer.

Q. And you were solicited to take what position in the company?

A. Treasurer.

Q. And that request was made when?

A. Well, Mr. Semmer, who was largely interested in the company, first approached me in the early part of '93.

Q. That was before you loaned them money at all?

A. Yes; probably a year before that.

Q. But after you became a creditor, when was the request made and how was it made that you should become treasurer of the company?

A. Well, I wasn't a creditor until December, 1893. I don't think I was a creditor of the company. It was along the close of December and the early part of January—between the first and the 10th of January.

Q. I understood you to say that you declined to accept the position until you had an opportunity to examine into the books, etc.?

A. Yes; after I had agreed to identify myself with the company on the statements which they had made to me and the pres-
481 entation of their affairs and conditions. The one unsettled thing was the examination into their affairs from their books.

Q. Did you make that examination?

A. I started to.

Q. You had every opportunity to make it, didn't you?

A. Yes.

Q. And having started and having had the opportunity, you then accepted the position, didn't you?

A. No, sir; I did not.

Q. Did you never take the position at all?

A. Under protest and under such conditions that it was not voluntary.

Q. You did then take it, at all events?

A. I did not take it. I did and I did not. If you will allow me to explain. On the day that I was elected treasurer of the company I had agreed to become a director, and before I really knew what they were at, they did try to persuade me to accept the treasurership. I didn't want to, but before I really knew what had happened, they had voted for me for treasurer.

Q. And you acted as treasurer?

A. And I accepted the position with the statement which I made on my direct examination.

Q. Irrespective of that statement, as a matter of fact, you acted as treasurer of that company?

A. Two days following my election as treasurer, I went to the office of the company at North Irwin and started to make an investigation of their books. On that day I tendered them my resignation, or rather told them that I would not act as treasurer of the company.

Q. Did you ever send a resignation to any meeting of the board of directors?

A. The executive committee was called at my instance that day.

Q. Did you see to it that your resignation was presented and accepted?

A. At the first regular meeting of the company.

Q. When was that?

482 A. They had great difficulty in getting a meeting of the directors of the company, because they were in such straights that you couldn't get them together, and it was only under the promise that they would relieve me of the position and upon my agreeing to not take any steps that I held over from day to day.

Q. Until what time did you hold over, as a matter of fact, without reference to the reasons for holding over?

A. I think it was on the 15th day of March, 1894.

Q. You say you had reduced your claims to judgments?

A. No, sir I didn't say that. I said they were to give me, in the meantime, after they would relieve me——

Q. I understood Mr. Schoyer to ask you if you were a judgment creditor?

A. Yes, sir, I did.

Q. How much was your judgment, do you remember?

A. I thought I had judgment for the whole amount.

Q. How much was it?

A. $42,000.

Q. At all events, you were a creditor at the time of the receivership to the extent of $42,000, in judgments or otherwise?

A. Yes.

Q. You did buy this property at the receiver's sale, didn't you?

A. Yes, sir.

Q. And not discussing any question of what your personal liability may have been, it was a fact that it was sold subject to the lien of this $250,000 mortgage, wasn't it?

A. It was subject to the lien of the mortgage; yes, sir.

Q. And you paid at that day how much?

A. $37,500.

Q. How soon afterwards did you organize the Penn Plate Glass Company?

A. About one year.

Q. Between the time that you got the deed from the receiver and the organization of the Penn Plate Glass Company, what, if any, money did you expend by way of betterments or improvements on the property?

A. Up to the time that I turned the property over to the Penn Plate Glass Company I had spent, I think it was about eighty-odd thousand dollars.

483 Q. Do you mean by that that you had spent eighty thousand dollars in excess of the amount of your bid?

A. Yes, sir; entirely outside of that.

Q. And you turned the property over to the Penn Plate Glass Company in the way in which you had got it—subject to the payment of this mortgage of $250,000, didn't you?

A. I made a deed to the Penn Plate Glass Company for the property in the same position as I held it—subject to the lien of the mortgage.

Q. What was the price at which you put the property into the Penn Plate Glass Company?

A. I turned this property over—or rather, I sold it to the Penn Plate Glass Company, at just exactly what it cost me; that is, the $37,500, 6 per cent. interest added on to the purchase-money up to the time, plus the improvements which I had made and paid for, they assuming——

Q. Plus the debt to you?

A. No, sir; plus the improvements which I had made, and they assuming the unpaid portion of those contracts not paid for yet on the improvements, less $10,000. I lost $10,700.

Q. What was the aggregate consideration in the deed?

A. I think the Penn Plate Glass Company bought that property from me at about $118,000. I'll bring the exact figures. It was at any rate ten thousand and some odd hundred dollars less than it cost me.

Q. $118,000, however, did not include the unpaid portions of contracts for betterments, did it?

A. Yes; that included all the money. That included in the first place the $37,500 which I paid to the receiver, the improvements which I had already paid for, and the improvements which were in the course of construction which I had not paid for, they assuming the payments of the contracts.

Q. In the meantime, had you negotiated for the purchase of any of the bonds secured by this mortgage?

A. No, sir.

Q. You did buy some of the mortgage bonds, didn't you?

A. No, sir.

484 Q. None whatever?

A. Not myself; no, sir.

Q. Did you have them bought for you, directly or indirectly?

(Objected to by counsel for defendant as incompetent and irrelevant and not cross-examination.)

A. No, sir.

Q. Mr. Kann, did you have any negotiations with or through the law firm of Hayes & Noble, or did you have anybody have any such negotiations for you or in your interest, for the purchase of any of the bonds secured by this mortgage in suit?

(Counsel for defendants object to the question as not cross and as incompetent and irrelevant, and instruct the witness not to answer it for the reason that it is not cross-examination, and the counsel for plaintiff has no right to the advantage of such testimony if it be proper, unless he calls the witness for himself; and for the further reason that if it is relevant at all, it is part of the plaintiff's case-in-chief.)

Question certified to court by the commissioner. Objection sustained as not proper cross-examination, and exception to complainant.

Q. Passing the last question, in your examination-in-chief you stated that in your opinion this plant was worth $300,000. I understood you to make some remark to the effect that it wasn't properly

constructed for its purpose. Did you take that as an element diminishing its value?

A. No, sir; even admitting that it was an operative plant was all right.

Q. Then you mean by your testimony-in-chief, deducting nothing by reason of its imperfect design and bad construction, it was in your judgment worth $300,000?

A. Not in my judgment worth that, but it cost that.

Q. In estimating cost, do you take into consideration what the builder's profit would be, or have you given figures which you think represent the actual cost of the building?

485 A. In getting at that estimate a liberal allowance was made.

Q. Did you know that under the contract between the Pennsylvania Plate Glass Company and Boyd & Co. there were certain lands included?

A. Yes, sir.

Q. Had you any knowledge of the value of real estate in the neighborhood of this plant, or what it was worth at that time?

A. Yes, sir; not at the time that that contract was made, but I have a knowledge of what it was worth at the time that I first knew of the property.

Q. In your estimate of $300,000, how much did you allow for the land?

A. Probably five or six thousand dollars.

Q. How large a tract of land was it?

A. About 21 acres, about $300 an acre.

Q. There were certain contracts turned over or to be turned over under this contract whereby the Irwin Natural Gas Company agreed to furnish natural gas.

Q. Were those contracts released?

A. With those contracts in force for a natural-gas supply for ten years and for water, it would have been a valuable consideration in that contract.

Q. But you have estimated nothing in the $300,000 for either the gas or the water?

A. To the contrary, at the time I became familiar with the property, the property, if it had any value as an operating plant outside of the cost of construction, which is of very doubtful value, it is a question whether it had any value at all, because it couldn't be operated for any other manufacturing purpose but a plate-glass plant, and not having these consideration- which were in that contract for gas and no water at all and no other source of fuel, why the plant lost outside of its construction value, its material value.

Q. I understand, but at the time this contract was entered into, the water and gas contracts were to be turned over as a part of the consideration?

A. Yes, sir.

Q. Do you know what they were worth at that time, in August, 1890?

A. Yes, sir; I do.

486 Q. What were they worth?

A. The town of Irwin and the citizens around there who owned the real estate and who wanted to enhance in price, contributed these considerations for gas and water on the express written condition that they should be used for the purpose of this plant, and also contributed the real estate, and it cost this concern of A. C. Boyd & Co. and the corporation of the Pennsylvania Plate Glass Company nothing.

Q. A. C. Boyd & Co. had the title to the land and the title to the contracts, didn't they?

A. Mr. Semmer, an individual, had the title to the land and also to the gas rights and was the medium through which the water rights were held. Mr. Semmer was given this land for the consideration of one dollar if he would have erected a plate-glass plant of a certain size on it. He turned it over to A. C. Boyd & Co. for $70,000.

Q. In this contract Boyd & Co. were to give the glass company the right to use certain improvements in grinding and annealing plate glass. What valuation did you put on them?

A. None at all. They had no improvements for them,—had no exclusive improvements.

Q. But you don't know what they were regarded as worth by the immediate parties to this contract at the time it was made, do you?

A. Oh, no. The individuals held all those things, and they turned it over to themselves as A. C. Boyd & Co.

Q. Now, this pot. What would it have cost to build that in 1890 or 1891, as provided for in this contract?

A. If it had been built as described in that contract, probably four or five thousand dollars. It had to be rebuilt.

Q. The stock-house. What would it have cost to have built that according to the provisions of this contract?

A. If you are going to go into detail, I will get the figures which I have made out.

487 Q. I want your own knowledge about it. Do you know of your own knowledge what it would have cost to have built any of the buildings that are specified in this contract, or are you, when you testified as to cost, testifying what somebody else told you would be a fair cost for it?

A. Will you allow me to explain?

Q. First answer my question.

A. I am testifying from my own knowledge. If you will let me explain a little further. I don't think when I strengthen my knowledge by getting the information of competent builders by having them make estimates of what they would build a like structure for, that it isn't within my own knowledge, and since my own knowledge is gained from the fact that I have since built additions to these various structures on the same line that they were built in order to keep up the conformity of the structure.

Q. When did you have these estimates made?

A. The first of them I had made in July of 1894, taking everything in detail. I had rough estimates made in March as soon as

I learned that they had overvalued their plant to such an alarming extent.

Q. But you wouldn't undertake now to give any valuations in detail as to the different structures and the different machinery contracted for by this contract to be furnished by A. C. Boyd & Co. to the Pennsylvania Plate Glass Company, would you?

A. Not without referring to papers and notes which I have. There is a great many details and a great many buildings of different heights and different construction. I would want to refresh myself by referring to the papers which I have made.

(Adjourned until Thursday, February 10th, 1898.)

And now, to wit, Thursday, February 10th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, February 17th, 1898.

488 And now, to wit, Thursday, February 17th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, February 24th, 1898.

And now, to wit, Thursday, February 24th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, March 3d, 1898.

And now, to wit, Thursday, March 3d, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, March 10th, 1898.

And now, to wit, Thursday, March 10th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony to meet Thursday, March 17th, 1898.

And now, to wit, Thursday, March 17th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, March 24th, 1898.

And now, to wit, Thursday, March 24th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner. All parties not being present, adjourned without taking any testimony, to meet Thursday, March 31st, 1898.

489 And now, to wit, Thursday, March 31st, 1898, at 10 a. m., met pursuant to adjournment at the office of H. D. Gamble, Esq., commissioner.

Present: The commissioner, H. D. Gamble, Esq.; Mess. J. S. and E. G. Ferguson, of counsel for complainant; S. C. Schoyer, Esq., of counsel for defendant.

*Testimony of Matthew P. Elliott.*

MATTHEW P. ELLIOTT, a witness called on behalf of defendants, being duly sworn, testified:

Direct examination by Mr. SCHOYER:

Q. Where do you reside, Mr. Elliott?

A. Irwin, Pa.

Q. What is your business?

A. I am a plate-glass superintendent, and I am constructive engineer and architect for the same work.

Q. I wish you would give, in your own words, your experience in plate-glass business and in the construction of plate-glass works.

A. Do you mean the whole of my experience?

Q. Yes.

A. My first experience dates back to 1871 at the Birmingham (England) plate-glass works, where I was appointed engineer and assistant manager. I was with those people until I came to this country, in 1881. I went then to the Crystal Plate Glass Company, Crystal City, Mo. I was assistant general manager of the plant, and also I was engineer and master mechanic, where I built two casting halls and two furnaces, and made other additions to the plant. I was with this company until June, 1888, when I was appointed the superintendent of the Diamond Plate Glass Company, a new organization.

Q. Where?

A. Indiana—Kokomo, Indiana, and Elwood, Indiana. There I built two large factories and remained with the company until 1895,
490 when the Diamond Plate Glass Co. was absorbed by the Pittsburg Plate Glass Co., and I remained with the Pittsburg Plate Glass Co. in the same capacity until January last.

Q. Did your duties involve a practical knowledge and overseeing of the construction and cost of construction of plate-glass works?

A. Yes, sir; my duties were to make the plans and make estimates of the same and superintend the construction under either our own men or the contractor.

Q. Were you familiar with the cost of construction of plate-glass plants in 1890, 1891 and 1892?

A. Yes, sir, because I was building those two plants in Indiana at that time.

Q. Were you familiar with the plant of the Pennsylvania Plate Glass Company at Irwin, and if so, I wish you would state how that happened and what the extent of your familiarity was.

A. In February, 1892, I was on a committee of seven——

(Objected to by Mr. E. G. Ferguson, of counsel for complainant, as not responsive to the question.)

A. (continued)—and on that committee their duties were to make a thorough examination of every plate-glass plant in this country

(the United States). In that capacity we paid a visit to the Irwin plant and made a very careful estimate of the capacity of the plant, beginning with the sizes of the pots and furnaces, the kilns, grinding and polishing machinery, and we gave our estimate—our final estimate—after a very careful calculation.

Q. Then at that time you familiarized yourself with the condition and methods of construction and the buildings and machinery and all that, constituting this plant?

A. Yes, sir; while it was not our duty—our business—to examine the condition of the plants, you understand, as regards the construction, we of course made it our business to examine the plants, because at that time there was a possibility of these plants being bought by the people whom I represented, and consequently, while we were not required to make any figures as to the
491 value of these plants, still we fortified ourselves by careful examination of the condition of the buildings and the machinery.

Q. And at that time you were familiar with the cost of materials and cost of construction of that plant?

A. Yes; it was absolutely necessary that I should be, because I could not undertake to build two very large plants, starting from the ground upwards, without I had been. As I say, I had to make plans of those plants and make estimates of every department.

Q. What could this plant have been constructed for, or the plant of the Pennsylvania Plate Glass Company, have been constructed for in 1891 or 1892?

(Objected to by counsel for complainants generally as incompetent, irrelevant and immaterial; and especially for the reason that, upon the witness' own statement, he made no calculation as to the value, quantity and price of the various parts of the machinery, buildings, etc., and cannot *not* now give a fair valuation.)

Q. Did you make such an examination of the buildings, machinery and the general matters entering into the construction of this plant, as would enable you to give an opinion on the cost or value at that time?

(Objected to by counsel for complainant as leading, incompetent, irrelevant and immaterial.)

A. Yes, sir.

Q. What could the plant of the Pennsylvania Plate Glass Company have been constructed for in 1891 or 1892?

(Objected to by counsel for complainant generally as incompetent, irrelevant and immaterial; and especially for the reason that, upon the witness' own statement, he made no calculation as to parts of the machinery, buildings, etc., and cannot give a fair valuation.)

A. For a plant of the capacity as we found it, well and substantially constructed, and as I would construct it myself, if I had the amount of money at my disposal, I would duplicate that plant as I found it at that time for $248,000.

492 Q. Have you refreshed your recollection, Mr. Elliott, from data made at that time?

A. Yes, sir.

Q. I wish you would give the basis upon which you arrive at that conclusion.

(Objected to by counsel for complainant for same reasons given in former objection.)

A. I have gone over the buildings very minutely since my last visit to the plant in 1892, and I can itemize my estimate if you wish. I will say then, commencing with the buildings, the pot-room, I place a value upon the pot-room—that is, understand now, do you wish me to give my valuation of the plant as it is, or as it should be. Because I want to say right now that the buildings are of a very, I should say, a very light construction; the frame-work for instance, the trusses and everything belonging to the buildings, is of a very cheap kind, not of such a substantial character as embrace the amounts which I would give.

Q. I mean as the plant should be.

A. Then I would say, the pot-room, as I should consider it should be, could be constructed for $4,000; casting hall, $52,000; grinding hall, $22,000; polishing hall, $20,000; wareroom, carpenters' shop, mixing-room, $10,000; boiler-room and rough mill, $3,000; making a total for the building of $110,000. Now the equipment is as follows: 33 annealing kilns, $30,000; 4 pot-houses, $1,500; 3 twenty-pot melting furnaces, $20,000; 6 boilers of 1,650-horse power, $20,000; 7 grinding machines with their foundations, $21,000; 7 engines for same, $2,700; 12 polishing machines with their foundations, $30,000; 12 engines for same, $4,500. Now the casting-hall machinery, consisting of 2 casting tables, 2 cranes, 2 rollers and carriages, with the necessary tools, $8,000, making a total for the equipment of $137,700, or a total for a factory of that capacity, well and substantially constructed, of $248,700.

Q. Were you familiar with the cost of the items, constituting the equipment, the machinery, etc., at that time?

493 A. Yes, sir; for this reason, that the same contractors who put in this machinery at Irwin put in a good amount of our machinery at Kokomo, the same contractors.

Q. Was it the same kind of machinery?

A. Yes, sir; so it was my duty at that time to investigate the various cost of every machine they put in at that plant—the Kokomo plant.

Q. You have now given your estimate on the basis of this being a substantial and well-constructed plant. What was the fact in that regard as to this plant?

A. My observations were that it was the cheapest construction so far as the buildings were concerned that I had ever had the opportunity to inspect. I found the frame construction generally throughout very light, the roofs were constructed also very light, covered with felt, a great many of them, instead of slate; and I have seen since my recent inspection of it that many of the trusses have been

repaired, the posts have been braced, the roof over the grinding shed was taken a list to the east of fully two feet, and only two weeks ago one of the main trusses over the annealing ovens broke, and as a measure of precaution we have prepared ourselves to brace by hog chains the entire roof over the casting department.

Q. What building is this that you have been talking about?

A. The casting hall.

Q. Is or is not that an important part of the plant?

A. It is a very important department.

Q. Of course, in this estimate, you don't include the contractors' profits?

A. No, sir. Well, I would say that the cost—I built the Kokomo plant under hired labor—we built it ourselves. We built the Elwood plant by contract; and I would say *by* these figures which I have given are a profit on the machinery, you understand, to the contractors, to begin with—that is, the profit on the equipments, I should say. In other words, to make this matter very clear, on the item of $137,700, that includes the profits of the builders. The item of $111,000 I have made liberal figures; and if I was to
494 take this matter up myself and employ my own men and superintend the matter myself—the work myself—I have no doubt it could be made for considerable less.

Q. So that, in regard to these items, you have made allowance for the contractors' profit?

A. Yes, sir.

Q. At the time you made this examination, Mr. Elliott, what was the capacity of finished glass at this time?

A. The committee, after making every allowance, gave them a capacity of 700,000 feet per annum—a capacity of 700,000 feet of polished plate; and I would further say that I found even that the company, to obtain that capacity, was running their machinery at a very rapid rate, and one which we all were of the opinion would only take a very short time until the machinery would either require reconstruction, which I believe was afterwards done. I can give you an instance. The polishing machinery was making 90 revolutions a minute, whereas the practical speed is not more than 60.

Q. What were the conditions as regards the gas, fuel and water supply?

(Objected to by counsel for complainants as incompetent, irrelevant and immaterial.)

A. I would say that there was no provision either for water or fuel. They were purchasing their water supply from a local company, and were using oil as fuel, with no provisions made at any future time to use solid fuel or gas.

Cross-examination by Mr. J. S. FERGUSON:

Q. What connection have you with the Penn Plate Glass Company?

A. Superintendent.

Q. Are you a stockholder?

A. No, sir.
Q. Have you any other interest except that arising from your employment?
A. No, sir.
Q. Does your compensation depend upon profit made by the concern?
A. No, sir.
Q. Is it a fixed salary?
A. Yes, sir.
Q. When were you so employed?
A. On the first of this month—the first of March, 1898.
495 Q. And it is since then you made the calculation to which you testify, isn't it?
A. Yes, sir.
Q. Previous to entering the employ of the Penn Plate Glass Co., where were you employed?
A. Kokomo, Indiana, and Elwood, Indiana, 21 miles apart.
Q. Those towns are in the northern part of the State, are they not?
A. Yes, sir.
Q. And how near the lakes?
A. 106 miles.
Q. Nearer Lake Michigan, I suppose?
A. Yes.
Q. Now, had you in 1892 any knowledge whatever of the cost of materials in the State of Pennsylvania?
A. No, sir.
Q. It is a fact, is it not, that lumber was very much cheaper in that part of Indiana than it was in Pennsylvania?
A. Not the lumber entering into the construction of a factory; no.
Q. Wasn't all lumber cheaper?
A. I think not.
Q. Very considerably?
A. No, sir; because we use in Indiana pine for trusses, and I find that oak lumber—while we used oak for our floors, there is very little difference in the cost today.
Q. I am asking as to the fact in 1892, and prior thereto.
A. Well, I was not there in 1892, and I don't know that. I am aware of the difference in the cost of materials you speak of.
Q. Isn't it a fact that the cost of brick was much cheaper in that part of Indiana than it was in Pennsylvania at that time?
A. Yes, sir.
Q. How much cheaper?
A. $1.00 a thousand.
Q. And the total price is what?
A. $1.00 a thousand—we paid in 1892 $6.00 a thousand in Indiana for brick, and I think it was costing $7.00 here.
Q. Do you know anything about what wages were there?
A. Yes, sir; our wages was a dollar a day more for bricklayers than they are here.
Q. Do you know anything as to the cost of machinery?
496 A. The cost of machinery was precisely the same—in fact, more for Indiana, because we had 300 miles more freight to

pay. This machinery I speak of, a great deal of it was made in Pennsylvania, and ours was made in Pennsylvania, and we have to pay the freight there on 300 miles.

Q. The figures that you gave are the results obtained from your experience in Indiana, are they not?

A. Yes; Indiana, Missouri. Then I will say this much: There was a condition existing amongst all the projectors of plate-glass factories—or when we built our first factory in Indiana, there were only three plate-glass factories built in the country, running, and we all had a lively interest to know how cheaply they could build their factories, and how cheaply they could run them and what their product would be, and that naturally led to inquiries about it.

Q. When you visited this factory in 1892, I understand you to say that you made such an examination then as enabled you then to form an opinion as to what the value of such a plant was?

A. Yes, sir.

Q. What opinion did you form at that time as to value?

A. I gave you the opinion in my testimony there.

Q. I understand that you are giving figures now based upon a calculation that you made within the last month or so?

A. No, sir; that is a mistake.

Q. Did you re-examine it?

A. Why I have not made a special object in re-examining. I have simply examined it since I have come here as the superintendent. It was necessary that I should go around and see the condition of everything. I have not gone around the plant to make a special estimate.

Q. Do you mean to tell me that you did not make a calculation within the last month as to the value of this plant and the different portions of it?

A. No, sir; not specially. These figures that I have given you are figures I could have given you in 1892.

Q. You referred to some data which you made at that
497 time. Will you please produce it?

A. The data? The data was the condition of the buildings.

Q. Was that all in you- mind, or was it put on paper?

A. We all made notes of these things in our minute books.

Q. Where are your notes?

A. Understand, in my testimony I say that we didn't have to make an official valuation of the plants. Our position and our duties were to give exact figures as to the capacity of the plants; but every gentleman that was on that committee made minutes—notes of the construction of the plants—because, as I said in my testimony, there was a probability of these plants coming into——

Q. I simply want to know whether you made notes in writing that related to the value of this building in 1892.

A. No, sir; not for anybody's use but my own.

Q. For your use or anybody else's?

A. In the note books I did.

Q. Have you control of them?

A. No, sir.

Q. Where are they?

A. Placed away.

Q. Have you control of them?

A. I certainly have control of them.

Q. What I want is whether you made special notes as to the value of this property?

A. No, sir; we would not be allowed to do such a thing without we went into the factory with that intention. I made no special notes for outside purposes.

Q. Then I understand you to say that you made no calculations since you became superintendent, is that right?

A. I have made these figures since I became superintendent.

Q. How did you go about making these figures?

A. By measuring the various buildings, by finding the sizes of the various buildings, the dimensions of them.

Q. What had you before you with reference to the cost of material and labor in 1892, or at the time of the construction of this plant, when you were making this estimate within the last month?

A. Why, I have nothing.

498 Q. Who was with you when you made the estimate?

A. This one I have given you now? No one.

Q. Whom did you get any information from?

A. No one.

Q. Didn't you get some from Mr. Kann?

A. No, sir.

Q. In calculating the expense for material and labor in this last calculation that you made, did you take the present cost of materials and labor?

A. Yes, sir.

Q. Do you undertake to say that you know whether the cost was the same in 1892 as it is now or not?

A. No, sir.

Q. Don't you know as a general fact that labor was higher and all materials dearer in 1892 than they are now?

A. Yes, I know that, but in making my statement, my estimate, of that I did not adhere strictly to what labor was a day or what brick was a thousand or lumber per thousand. That is what my honest opinion would be of the value of that plant. Of course I know machinery was less, but in that $137,000 I gave the price that was paid for that machinery in 1892, because I had the same bids from the same parties who furnished that machinery to the Penn Plate Glass Co. for the Diamond Plate Glass Co.

Q. Identically in size, design and everything else?

A. Yes, sir; identically the same machinery.

Q. But as to that estimate you might be considerably off the mark, mightn't you?

A. I might be a little, but I don't think very much.

Q. Now, leaving aside the question of what you yourself could have built that building and furnished that machinery for if you were building it for yourself, what in your judgment could it have been built for if it had been let in the market to contractors engaged in that line of work?

A. Well, as I have said before, the prices I have put down for the

machinery is the contractor's price, not mine, not mine at all, and the only difference is this, that the contractors, figuring on
499 those buildings, would add, possibly, his profits, which might be 20 per cent. or 30 per cent. Now as a practical engineer and an architect as well, contractors, figuring out brick-work, figure 21 bricks to the cubic foot. There is only 17 absolutely in the cubic foot, so that the contractor in all cases clears 3 bricks—charges for 3 bricks in every cubic foot which he does not put in.

Q. Are you a contractor yourself?

A. No, sir.

Q. Would you undertake to say that was absolutely true, or only true in some instances?

A. It is a mere question of measurement; just you count——

Q. Your statement is that all contractors so figure, and I want to know whether that be true?

A. I wouldn't say. That is the usual custom—21 bricks to a cubic foot.

Q. Do you know of any such custom existing in Pennsylvania, Westmoreland county?

A. No, sir; I do not.

Q. Well, I happen to know to the contrary. I know that it doesn't exist.

Redirect examination by Mr. SCHOYER:

Q. Mr. Elliott, do you or do you not base the estimates which you have given here upon knowledge acquired in 1892?

—. That is just what I say. In 1892 there were several projects on foot——

Q. Did you have in 1892 a general knowledge of the cost of materials and the prices of labor?

A. In the State of Indiana I had an intimate knowledge, and also in Missouri I had an intimate knowledge; but I had not worked in Pennsylvania, but as I say, I know their bricks were higher, but I know the labor was less.

Q. And has your experience in Pennsylvania since demonstrated that there was a great deal of difference—any more than the nominal difference—between the cost of such construction in the State of Pennsylvania and that in Missouri or Indiana?

A. Not at all, sir; not at all.

Q. Is it or is it not a fact that there is a custom among contractors as to the amount of the profit that they figure to themselves in any job?

500 (Objected to by counsel for complainant as irrelevant and that the witness is not competent to answer.)

Counsel for defendants offer in evidence the exemplification of the record in the suit of A. C. Boyd *vs.* Philip Semmer and George Cowen, in the court of common pleas of Westmoreland county, No. 270, equity—marked Exhibit No. 109.

Counsel for defendants offer in evidence the proceedings in the bill in equity brought by George Cowen *et al. vs.* The Pennsylvania Plate Glass Company, exemplified according to act of Congress in the court of common pleas of Westmoreland county, No. 265,

equity, marked Defendants' Exhibit 110, containing, *inter alia*, exemplified copy of the order of the court authorizing the sale of the plant of the Pennsylvania Plate Glass Company by the receiver—this for the purpose of showing that the order of court aforesaid provides for the sale "subject to the lien" of the mortgage.

Counsel for defendants offer in evidence copy of deed exemplified according to act of Congress, from Joseph W. Stoner, receiver of the Pennsylvania Plate Glass Company, to William L. Kann, marked Defendants' Exhibit 111, for the purpose of showing the conveyance of the property of *of* the Pennsylvania Plate Glass Company to the said Kann, and the terms thereof in regard to the lien.

Counsel for defendants offer in evidence copy of deed, exemplified according to act of Congress, marked Defendants' Exhibit No. 112, from William L. Kann *et ux.* to Penn Plate Glass Company, dated July 1st, 1895.

The foregoing offers objected to by counsel for complainant as incompetent, irrelevant and immaterial.

Testimony on part of defendant closes and defendants rest.

H. D. GAMBLE, *Examiner.*

501 *Stipulation.*

Counsel for complainant and the counsel for the Penn Plate Glass Co. and W. L. Kann, stipulate that the printing of the exhibits be waived, and that the said original exhibits may be used by both parties on the hearing of this case with the same force and effect as if the same had been printed.

S. SCHOYER, JR.,
*Of Counsel for W. L. Kann and Penn Plate Glass Co.*
J. S. & E. G. FERGUSON,
*Of Counsel for Complainants.*

September 14th, 1898.

502 UNITED STATES OF AMERICA, *set:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify that the foregoing pages, from one to five hundred and one, inclusive, of volume one, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of The Penn Plate Glass Company and Wm. L. Kann, appellants, and The Farmers' Loan and Trust Company, trustee, appellee, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-second day of October, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
*Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

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IN THE

# United States Circuit Court of Appeals,

THIRD CIRCUIT.

## IN EQUITY.

**No. . SEPTEMBER TERM, 1899.**

**THE PENN PLATE GLASS CO. and WM. L. KANN, APPELLANTS,**

**vs.**

**THE FARMERS' LOAN AND TRUST CO., TRUSTEE, APPELLEE.**

# RECORD, Vol. II.

TURNER, McCLURE & ROLSTON,
J. S. & E. G. FERGUSON,
*Solicitors for Appellees.*

S. & S. B. SCHOYER,
*Solicitors for Appellants.*

1 In the United States Circuit Court, Western District of Pennsylvania.

THE FARMERS' LOAN AND TRUST COMPANY, as Trustee, Complainant,
*against*
PENNSYLVANIA PLATE GLASS COMPANY ET AL., Defendants.

*Petition for Leave to File Supplemental Bill.*

To the honorable the judges of said court:

Your petitioner, The Farmers' Loan and Trust Company, complainant in the above-entitled cause, respectfully shows to the court that on or about the 8th day of July, 1896, it filed its bill herein for the foreclosure of a certain mortgage made to it by the Pennsylvania Plate Glass Company, dated the first day of January, 1891, to secure a series of bonds; that said cause is now pending in this court undetermined, and that during the pendency of said cause a large portion of the property, which is the subject-matter of said foreclosure suit, being the property covered by said mortgage, was destroyed by fire, and that as your petitioner is advised, the said pending suit has become defective by reason of said fire and other events happening after the filing of the bill, and that for that reason a supplemental bill has become necessary to be filed in the cause, and your petitioner herewith files a copy of its proposed supplemental
2 bill, making the allegations thereof the allegations of this its petition, and prays leave to file the same.

And your petitioner will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By E. S. MARSTON, [SEAL.]
*Vice-President.*

Attest: SAMUEL SLOAN, JR., *Secretary.*

TURNER, McCLURE & ROLSTON,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Edwin S. Marston, being duly sworn, deposes and says that he is the vice-president of The Farmers' Loan and Trust Company, the complainant above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true; that this verification is not made by the complainant, because it is a corporation; that his knowledge is derived from having taken part in the transactions spoken of and from statements

made to him, and from examination of the papers, and the same constitute his grounds of belief; that the seal affixed to the said petition is the corporate seal of said complainant and was so affixed by its authority.

E. S. MARSTON.

Sworn to before me this 19th day of May, 1898.

W. B. CARDOZO,
[SEAL.] *Notary Public.*

*Order.*

And now, May 28th, 1898, on presentation of the within petition, hearing of counsel and upon due consideration thereof had, leave is hereby granted to petitioner to file the supplementary bill as prayed for.

By the court:

JOS. BUFFINGTON, *Judge.*

3 *Supplemental Bill.*

To the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, in equity sitting:

The Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office and place of abode in the city of New York, brings this its supplemental bill of complaint, in addition to its original bill of complaint, against the Pennsylvania Plate Glass Company, a corporation created and existing under the laws of the State of Pennsylvania, and a citizen of the State of Pennsylvania, and having its principal office and place of abode in the county of Westmoreland and State of Pennsylvania; and against the Penn Plate Glass Company, a corporation duly created and existing under the laws of the State of Pennsylvania, a citizen of the State of Pennsylvania, and having its principal office and place of abode in the county of Westmoreland and State of Pennsylvania; and against W. L. Kann, a citizen of the State of Pennsylvania, residing in the city of Pittsburgh, in said State; and against the following insurance companies, corporations, and citizens of the State of Pennsylvania: Monongahela Insurance Company of Pittsburgh; Insurance Company of North America, of Philadelphia; Teutonia Insurance Company, of Allegheny; Spring Garden Insurance Company, of Philadelphia; Armenia Insurance Company of Pittsburg; Artisans' Insurance Company, of Pittsburg; Pittsburg Insurance Company, of Pittsburg; City Insurance Company of Pittsburg; Insurance Company of the State of Pennsylvania, of Philadelphia; State Insurance Company, of Philadelphia; Franklin Fire Insurance Company, of Philadelphia; Pennsylvania Fire Insurance Company, of Philadelphia; Farmers' Insurance Company, of York; Ben. Franklin Insurance Company, of Allegheny; Schuylkill Fire Insurance Company, of Philadelphia; and against the following insur-

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ance companies, corporations, and citizens of the State of Massachusetts: Mutual Protection Fire Insurance Company, of Boston; Springfield Fire and Marine Insurance Company, of Springfield; and against the following insurance companies, corporations, and citizens of the State of New York: Assurance Company of America, of New York; Eastern Insurance Company, of New York; Lafayette Fire Insurance Company, of New York; Westchester Fire Insurance Company, of New York; Manhattan Insurance Company, of New York; Pacific Fire Insurance Company, of New York; Norwood Insurance Company, of New York; Broadway Insurance Company, of New York; Hanover Fire Insurance Company, of New York; Queen (America) Insurance Company, of New York; State Insurance Company, of New York; Erie Fire Insurance Company, of Buffalo; Victoria Fire Insurance Company, of New York; National Standard Insurance Company, of New York; Globe Fire Insurance Company, of New York; Insurance Company of the State of New York, of New York; Niagara Fire Insurance Company, of New York; Mutual Fire Insurance Company, of New York; Farragut Fire Insurance Company, of New York; Colonial Assurance Company, of New York; Commonwealth Insurance Company, of New York; Citizens' Insurance Company, of New York; and against the following insurance companies, corporations and citizens of the State of Connecticut: Ætna Insurance Company, of Hartford; Hartford Fire Insurance Company, of Hartford; National Fire Insurance Company, of Hartford; Connecticut Fire Insurance Company, of Hartford; and against the following insurance companies, corporations and citizens of the State of Missouri: Citizens' Insurance Company, of St. Louis; American Central Insurance Company, of St. Louis; and against the Merchants' Insurance Company, of Providence, a corporation and citizen of the State of Rhode Island; and against the Virginia State Insurance Company, of Richmond, a corporation and citizen of the State of Virginia; and against the Washington Insurance Company, of Cincinnati, a corporation and citizen of the State of Ohio; and against the Capital Fire Insurance Company, of Concord, a corporation and citizen of the State of New Hampshire; and against the Merchants' and Manufacturers' Fire Insurance Company, of Baltimore, a corporation and citizen of the State of Maryland; and against the Atlanta Home Insurance Company, of Atlanta, a corporation and citizen of the State of Georgia; and against the St. Paul Fire and Marine Insurance Company, of St. Paul, a corporation and citizen of the State of Minnesota; and against the Grand Rapids Fire Insurance Company, of Grand Rapids, a corporation and citizen of the State of Michigan; and against the Southern Insurance Company, of New Orleans, a corporation and citizen of the State of Louisiana; and against the following insurance companies and associations, citizens of Great Britain: The Scottish Union and National Insurance Company, the Commercial Fire Insurance Company of Scotland, the Caledonian Insurance Company, all of Edinborough, in Scotland; the Scottish Alliance Insurance Company, of Glasgow, in Scotland; the North British

and Mercantile Insurance Company, the Commercial Union Insurance Company (Limited), the Atlas Assurance Company, the Union Assurance Society, the Phœnix Assurance Company, the Imperial Insurance Company (Limited), the Northern Assurance Company, all of London, in England; the Liverpool and London and Globe Insurance Company, of Liverpool, in England; the Palatine Insurance Company, the Manchester Fire Assurance Company, both of Manchester, in England; and against the following insurance companies and associations, citizens of Germany: The Transatlantic Insurance Company, the North German Fire Insurance Company, the Hamburg-Bremen Fire Insurance Company, all of Hamburg, in Germany;
6 the Aachen and Munich Fire Insurance Company, of Munich, in Germany; the Aachen-Leipzic Insurance Company, of Aix-la-Chapelle, Germany; the Magdeburg Fire Insurance Company, of Magdeburg, Germany; and against the Svea Association, of Gothenburg, Sweden; and against the Netherlands Insurance Company, of Zutphen, in the Netherlands; and against the Urbaine Belge Insurance Company, of Brussels, in Belgium; and against William Adams, J. Stanley Lockwood and Remey R. Foreman, all of New York, constituting the firm of Adams, Lockwood & Foreman, attorneys-in-fact of the Traders' Fire Lloyds Insurance Company, of New York, and against Edwin C. Jameson and Joseph S. Frelinghuysen, both of New York, constituting the firm of Jameson & Frelinghuysen, attorneys-in-fact of the Manufacturers' Lloyds, of New York.

And thereupon your orator complains and says:

I. That heretofore, and on or about the 8th day of July, 1896, your orator filed its original bill of complaint herein against the said defendants, Pennsylvania Plate Glass Company, Penn Plate Glass Company and W. L. Kann, praying, among other things, for the foreclosure of the mortgage or deed of trust made by the said defendant Pennsylvania Plate Glass Company to your orator, and dated the 1st day of January, 1891.

II. Said mortgage or deed of trust was duly made, executed and delivered by the said defendant Pennsylvania Plate Glass Company on or about the day of its date, and was duly recorded in the office of the recorder of deeds of the county of Westmoreland, in the State of Pennsylvania (in which county the mortgaged property is situated), in Mortgage Book No. 43, at pages 1, etc., on January 12, 1891, and the same is a valid conveyance for all the purposes therein stated. The trusts therein and thereby created were duly accepted by your orator before the recording of the said mortgage or deed of trust as aforesaid. Said mortgage or deed of trust was given to
7 secure the payment of an issue of bonds of the said Pennsylvania Plate Glass Company, aggregating the sum of two hundred and fifty thousand dollars of principal, all of which bonds were duly executed by the said Pennsylvania Plate Glass Company, and duly certified by your orator, delivered and issued, and are now outstanding and existing obligations on the part of the said Pennsylvania Plate Glass Company. Default was made by the said company in the payment of the semi-annual coupon interest

which fell due upon all of its said bonds upon the first day of July, 1895, and upon the first days of January and July, 1896, and demands in writing in accordance with the terms of the said mortgage or deed of trust were duly made upon the said defendant Pennsylvania Plate Glass Company and upon the said defendants, Penn Plate Glass Company and W. L. Kann, who had purchased the property covered by said mortgage or deed of trust, as hereinafter alleged, for the payment of the said instalments of interest on some of the said bonds which fell due as aforesaid respectively, and payment of the same was refused; and the said respective defaults with the exception of the said default of July, 1896, had continued for a period of over six months and still continued at the time when your orator's said original bill of complaint was filed, and your orator elected in accordance with the provisions of the said mortgage or deed of trust that the principal of all of the said bonds, and the accrued interest thereon, should be, and the same did upon said election become, immediately due and collectible from and out of the mortgaged property, and was so due and upaid at the time of the filing of your orator's said original bill of complaint. All the matters hereinabove in this paragraph alleged were more fully and specifically alleged in your orator's said original bill of complaint, and a full description of the property covered by the said mortgage or deed of trust was therein set forth, and your orator now refers to its said original bill and prays that all of said allegations
8 and descriptions therein contained may be taken as herein repeated in full.

III. Since your orator's said original bill of complaint was filed as aforesaid additional instalments of interest on said bonds have fallen due on the first days of January and July, 1897, and the first day of January, 1898; but no part of the principal of any of the said bonds or of the said interest accrued thereon either at the time of the filing of your orator's said original bill of complaint, or since that time, has ever been paid, and all of the said principal and interest still remains due and unpaid at the present time.

IV. Your orator's said original bill of complaint was filed on or about the 8th day of July, 1896, and the said defendants, Penn Plate Glass Company and W. L. Kann, on or about the 14th day of September, 1896, filed demurrers thereto, and likewise, a joint and several answer, to which your orator filed exceptions on or about the 28th day of October, 1896. Your orator immediately thereafter made a motion for a reference to a master to examine and report upon said exceptions, and was anxious to proceed at once with the argument upon said demurrers and said motion to refer, and repeatedly through its attorneys urged the said defendants to agree upon some early day for the presentation of said matters to the court, but said defendants delayed in so doing, so that the argument thereof did not take place until on or about the 10th day of January, 1897. The court then took said matters under advisement and in the month of March, 1897, rendered its decision, overruling said demurrers and dismissing said exceptions.

V. The said cause was duly put at issue and in said month of

March, 1897, was ready for the taking of testimony, and on or about the 12th day of April, 1897, your orator, pursuant to notice theretofore given, took the bulk of its testimony in support of the allegations of its said original bill, and with the exception of an extremely small part thereof, all of its said testimony was completed by
9 the 17th day of April, 1897. But said defendants, although there was no reason why they should not have proceeded at once to take testimony in support of the allegations of their said joint and several answer, neglected to take any part thereof until on or about the 27th day of September, 1897, when they began to take such testimony, and continued taking the same throughout the months of October, November and December, 1897, and January, February and March, 1898, the testimony so taken by them covering over 500 typewritten pages. Your orator is advised by counsel learned in the law and therefore alleges that the said joint and several answer of said defendants does not set up a valid defence to your orator's said original bill of complaint, which is purely a bill for the foreclosure of said mortgage or deed of trust, dated July 1st, 1891; but the said answer, filed by the parties who had purchased the said mortgaged property expressly subject to said mortgage, as hereinafter alleged, concerns almost exclusively the proceedings of the stockholders in organizing said Pennsylvania Plate Glass Company, which has filed no answer to said original bill of complaint, and of certain alleged holders of the bonds secured by said mortgage, who are not parties to this cause, with a view to showing that said persons are not *bona fide* holders of said bonds, and are not entitled to share in the benefit of said mortgage, or to enforce the same; but said answer in terms alleges that the said respondents "do not contest or deny the right of an innocent holder of said bonds to rely upon the said mortgage." And your orator is advised by counsel learned in the law, and therefore alleges, that the effect of said answer is not to deny the lien of your orator's said mortgage, or to set up a legal defence to the right of your orator to enforce the same to the extent of the bonded indebtedness lawfully existing thereunder, but is simply to deny the right to participate in the proceeds of a foreclosure sale, of such of said bondholders as may not be *bona fide* holders of said bonds, if any such there be, whose rights
10 cannot in any way affect the right of your orator as trustee under the mortgage to enforce the same. And your orator is further advised, and therefore alleges, that the right of your orator as such trustee to foreclose said mortgage under its said original bill without the request of any of said bondholders was in effect declared and vindicated by the decision of this honorable court in this cause rendered as aforesaid in the month of March, 1897, long before the fire hereinafter mentioned, overruling the said defendants' demurrers to your orator's said original bill; by which decision, all of the allegations of said answer concerning the *bona fides* of certain of said bondholders were in effect decided to be utterly immaterial and irrelevant, and impotent to prevent a foreclosure of said mortgage by your orator under its said original bill. Nevertheless, and in spite of the manifest futility of said alleged defense, and although

your orator had attempted to prevent the same by excepting to the said answer as aforesaid, the said defendants proceeded, as hereinabove alleged, to take a vast amount of testimony under the said allegations of their said answers, and thus to delay the final adjudication of this case and to obstruct your orator in carrying out the provisions of its said trust. The said defendant, Pennsylvania Plate Glass Company, which executed the said bonds and mortgage, as hereinbefore alleged, has made no defence herein, and but for the said answer of said defendants, Penn Plate Glass Company and W. L. Kann, your orator would have obtained a decree of foreclosure and a sale of the mortgaged property many months ago, and long before the fire hereinafter mentioned occurred.

VI. Your orator further alleges upon information and belief that the said defendant W. L. Kann became the purchaser and owner of the said mortgaged property on or about the 2d day of July, 1894, in the following manner: That in or about the month of December, 1893, the said Kann entered into an arrangement with the said Pennsylvania Plate Glass Company, the mortgagor company,
11 whereby he agreed to identify himself, and did identify himself, with the said company, and at or about the same time, in pursuance of said arrangement, made certain advances and loans to the said company and became a stockholder therein, and a director and the treasurer thereof; that at the time of said Kann's becoming thus intimately connected and identified with said mortgagor company, he was fully aware of the existence of said bonds and mortgage and, after becoming so connected and identified therewith, had full access to the books and papers of said company, and did in fact examine the same in order to familiarize himself with the exact financial condition of said company and became thoroughly cognizant of the finances of said company, and of its outstanding obligations, including the said bond and mortgage; that, by the said examination, in connection with his previous knowledge of the condition of said company, he was satisfied that said company was then insolvent, but nevertheless continued to make advances to the said company, and increased its said indebtedness to himself up to the amount of $42,500, or thereabouts, and continued to be an officer of said company, as aforesaid, until on — about the 15th day of March, 1894; that it was a part of said arrangement between said company and said Kann that said company should give him its judgment notes for the advances and loans to be made by him as aforesaid, and the said company did voluntarily give such judgment notes to the said Kann for a large part of said indebtedness, and said Kann instituted legal proceedings based upon said indebtedness and procured attachments to be issued against property of said company, and otherwise so increased the embarrassment of the said company, that thereafter and on or about the 19th of March, 1894, it became inextricably involved in litigation, and a bill in equity was accordingly filed against said company by creditors and directors thereof, in the court of common pleas of Westmoreland county, State of Pennsylvania, praying,

among other things, for the appointment of a receiver to take
12 into his custody the property and effects of said corporation and to wind up its business; that, in said equity suit, one Joseph W. Stoner, the then secretary of said company, was, on said 19th day of March, 1894, appointed receiver of said company, as prayed in said bill in equity, and such proceedings were thereafter had that, on or about the 18th day of June, 1894, under the order of said court of common pleas made in said suit in equity, all of the said Pennsylvania Plate Glass Company's property covered by said mortgage or deed of trust to your orator, was sold at public auction to the said Kann for the sum of thirty-seven thousand five hundred dollars or thereabouts; that said sale was made expressly subject to the said mortgage to your orator; that the deed of the said property made by said receiver to said Kann, in pursuance of such sale, dated the 2d day of July, 1894, expressly recited that said property was thereby conveyed "subject*ed* to a mortgage made by said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company of the City of New York, dated 1st January, 1891, recorded in Westmoreland county in Mortgage Book No. 43, page 1," being the said mortgage or deed of trust made to your orator as aforesaid. And your orator further alleges that at the time of said sale and conveyance the said Kann had full, actual and complete notice and knowledge of the said mortgage and of the bonds secured thereby, and of every provision, covenant, stipulation and agreement therein contained, including the provisions, covenants, stipulations and agreements hereinafter mentioned relating to the insurance of said mortgaged property.

VII. Your orator further alleges upon information and belief that the said Kann succeeded by means of his said judgments and attachments in collecting by far the greater part of said indebtedness of said Pennsylvania Plate Glass Company to himself out of property of said company other than that covered by your orator's said mortgage, and sold as aforesaid to said Kann, subject to said
13 mortgage; but that said Kann nevertheless continued to hold said mortgaged property as such purchaser from the 2d day of July, 1894, to the 1st day of July, 1895.

VIII. Your orator further alleges that during his possession of said mortgaged property, the said Kann recognized the validity of your orator's said mortgage, and of the bonds secured thereby, and of the obligation charged thereby on the said property, and accordingly paid interest coupons which fell due on said bonds during his said possession.

IX. Your orator further alleges on information and belief that on or about the first day of July, 1895, the said Kann by deed dated that day conveyed all of said original mortgaged property, together with certain improvements made thereon by himself, to the said defendant Penn Plate Glass Company, for a consideration named in said deed of eighty-three thousand five hundred dollars, being, as your orator is informed, the said sum of $37,500 paid by said Kann at the said receiver's sale for the said original mortgaged property, plus the cost of the said improvements; that the said defendant,

Penn Plate Glass Company, was organized by said Kann for the express purpose of purchasing said property and operating said plant; that the said Kann was at the time of such purchase, and still is, the principal stockholder therein and president thereof and in every respect in control of and identified with the said Penn Plate Glass Company; that the sale of said property by said Kann to said Penn Plate Glass Company was made expressly subject to the said mortgage to your orator; that the said deed given by said Kann to said Penn Plate Glass Company expressly recited that said property was thereby conveyed "subject to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company at the city of New York for two hundred fifty thousand dollars ($250,000) dated Jan. 1, 1891, recorded in Westmoreland county in Mortgage Book 43, page 1," being the said
14 mortgage or deed of trust made to your orator as aforesaid.

And your orator further alleges that at the time of said sale and conveyance the said Penn Plate Glass Company had full, actual and complete notice and knowledge of the said mortgage and of the bonds secured thereby, and of every provision, covenant, stipulation and agreement therein contained, including the provisions, covenants, stipulations and agreements hereinafter mentioned relating to the insurance of said mortgaged property.

X. Your orator further alleges that in and by said mortgage or deed of trust it was among other things provided that it should be no part of the duty of your orator as trustee thereunder to file or record the said mortgage or deed of trust as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which might be suitable and proper to be done for the continuance of the lien thereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor should it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payments to be made; but that your orator, as such trustee, might, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done.

XI. Your orator is advised and therefore further alleges that under the said mortgage or deed of trust it was the duty of the said Pennsylvania Plate Glass Company to insure the mortgaged property and to keep the same insured for the benefit of your orator, as trustee under the said mortgage and of the holders of the bonds secured thereby; and that by the provisions of said mortgage or deed of trust hereinabove recited the said Pennsylvania Plate Glass Company covenanted, stipulated and agreed to effect and to
15 preserve such insurance, and covenanted, stipulated and agreed that your orator, as such trustee, might require the same to be done.

XII. Your orator further alleges that the said defendant Penn-

sylvania Plate Glass Company, although required so to do by the terms of said mortgage or deed of trust, has neglected and failed to insure, or to keep insured, the said mortgaged property for the benefit of your orator as such trustee or the holders of the bonds secured by said mortgage or deed of trust, and that by such failure and neglect it has been guilty of a breach of its covenant, stipulation and agreement therein contained and hereinabove recited with respect to insurance, which said breach was made a long while before the said defendant Penn Plate Glass Company became the owner of said mortgaged property as aforesaid, and much more than a year prior to the filing of your orator's said original bill of complaint, and has ever since continued.

XIII. Your orator further alleges, on information and belief, that the said Pennsylvania Plate Glass Company, although subsequently failing and neglecting as aforesaid to insure and to keep insured said mortgaged property for the benefit of your orator as such trustee, and of said bondholders, nevertheless, prior to the time when the said Kann became as aforesaid connected and identified therewith, recognizing the said obligation imposed upon it by the said mortgage under said covenant, stipulation and agreement relating to insurance, did insure said property for the benefit of your orator, as such trustee, and of said bondholders; and said Joseph W. Stoner, as such receiver, appointed in said equity proceedings as aforesaid by the said court of common pleas of Westmoreland county, Pennsylvania, did likewise, under an order of said court, partially insure and keep insured, said mortgaged property for the benefit of your orator, as such trustee, and of the said bondholders, all of which,
16 as your orator is informed and believes, was well known to said Kann and to said Penn Plate Glass Company at the times of their respective purchases of said property as hereinabove recited.

XIV. And your orator further alleges that after said Kann had purchased said mortgaged property for the said sum of $37,500 or thereabouts, and had become the owner thereof, subject to the said mortgage; and although said Kann recognized as aforesaid the validity of said mortgage and the bonds secured thereby and accordingly paid interest coupons falling due thereon; and although said Kann had, as aforesaid, full, actual and complete notice and knowledge of said bonds and mortgage, and of the stipulations, covenants and agreements therein contained, including said stipulation, covenant and agreement concerning insurance; and although said Kann had, as aforesaid, increased the indebtedness of said Pennsylvania Plate Glass Company to himself after becoming convinced of its insolvency and had by his own acts so embarrassed said company of which he was then stockholder, director and treasurer, in the performance of its contracts and the carrying out of its agreements, covenants and stipulations, that it was thrown into the hands of a receiver and its property sold at public sale to said Kann for an exceedingly small sum; and although your orator persistently demanded of said Kann that he carry out the terms and provisions of the said mortgage concerning insurance, and demanded that he preserve the insurance already effected as aforesaid, and that he effect

further insurance for the benefit of your orator, as such trustee, and of said bondholders; nevertheless, said Kann positively and deliberately refused to preserve the existing insurance, or to effect new insurance for the benefit of your orator as such trustee, or of said bondholders, and intentionally allowed the said existing insurance to lapse and to be cancelled. And your orator is advised by counsel learned in the law, and therefore alleges, that said Kann was bound in equity, as the purchaser of said property as aforesaid,
17 subject to the said mortgage, and under the circumstances hereinbefore set forth, to insure and to keep insured for the benefit of your orator as such trustee, and of said bondholders, the said mortgaged property; and that by neglecting so to do said Kann was guilty of a breach of said covenant, stipulation and agreement in said mortgage contained which said breach was in existence at the time when the said Kann organized the said defendant Penn Plate Glass Company for the purpose of operating said plant, and sold said property to said new company as aforesaid; and which said breach was known to said Penn Plate Glass Company, at the time of its said purchase, and has been known to said company ever since, and still continues.

XV. Your orator further alleges that this cause was begun on or about the 8th day of July, 1896; that immediately thereafter your orator made a motion before this honorable court for the appointment of a receiver herein to take possession of the said mortgaged property pending the decision of this cause; that one of the chief grounds of your orator's said motion was to obtain a means for effecting and providing insurance of its interests as such trustee, and of the interest of the said bondholders, in view of the refusal to effect such insurance hereinbefore set forth; that the said defendants Kann and The Penn Plate Glass Company were both before this honorable court on said motion, and opposed said motion and succeeded in obtaining a ruling of this court adverse to your orator and the denial of your orator's said motion. And your orator further alleges that in answer to its said insistance concerning the insurance of its interests, as a trustee, and of those of the said bondholders, said defendants Kann and Penn Plate Glass Company continued to maintain their attitude of refusal to effect such insurance in spite of the demands of your orator, and procured to be filed in this court a certain bond whereby said Kann and one Emanuel Wertheimer covenanted to pay to your orator, as such trustee
18 for the holders of said bonds, in case of loss, a sum equal to the total amount of such of said bonds as might be valid, out of certain policies of insurance then existing in favor of the said Penn Plate Glass Company, being the policies hereinafter referred to, provided that it should be finally adjudicated that the said Penn Plate Glass Company was bound or liable by anything contained in said mortgage, or the terms of its purchase of said mortgaged property, to keep and maintain insurance for the benefit of the holders of bonds secured by said mortgage.

XVI. Your orator is advised and therefore alleges that by reason of the matters hereinbefore alleged, the said Penn Plate Glass Com-

pany, as well as said Kann, was bound by the said covenant, stipulation and agreement in said mortgage relating to insurance, and was also bound in equity under the said mortgage and by virtue of the matters hereinbefore alleged, to insure, and to keep insured, the said mortgaged property in terms for the benefit of your orator, as such trustee, and of the holders of said bonds, but that it has failed to do so, and its said failure is a breach of the said covenant, stipulation and agreement relating to insurance and of its said obligation under said mortgage and as purchaser of said property as aforesaid.

XVII. Your orator further alleges, on information and belief, that the said Penn Plate Glass Company has taken out policies of insurance covering respectively said mortgaged property, or a part thereof, with all of the insurance companies made by this bill parties to this cause, being all of the defendants hereto other than the said defendants Pennsylvania Plate Glass Company, Kann and Penn Plate Glass Company, and that said policies amount in the aggregate to $450,000 or thereabouts, and constitute legal and valid obligations on the part of said defendant insurance companies; but your orator is not informed as to, and cannot therefore allege, the amounts of the respective policies.

19 XVIII. Your orator further alleges that long after the said defaults in the payment of interest on said bonds, and the maturity of the principal of said bonds, and of your orator's right to foreclose said mortgage, as alleged in your orator's said original bill of foreclosure, and in this, its supplemental bill; and long after the failure of said Pennsylvania Plate Glass Company, Kann and Penn Plate Glass Company respectively as aforesaid to insure in terms for the benefit of your orators as such trustee, and of the said bondholders, as demanded and required by your orator; and long after the taking out of the said policies of insurance by the said Penn Plate Glass Company as hereinabove recited; and long after this cause was begun and put at issue by said defendants, Kann and Penn Plate Glass Company, and while the said Pennsylvania Plate Glass Company, Kann and Penn Plate Glass Company still continued to refuse and to neglect to insure the said mortgaged property in terms for the benefit of your orator, as such trustee, and of said bondholders; and while the breach of the said covenant, stipulation and agreement as to insurance contained in said mortgage still continued as aforesaid on the part of all three of said defendants, a very great portion of the property covered by the said mortgage was destroyed by fire. The said fire, as your orator is informed and believes, occurred on or about the 12th day of April, 1898, and by reason thereof the greater part of the security of said mortgage has been lost, without fault on the part of your orator, and the remaining property, as your orator is informed and believes, and therefore alleges, constitutes wholly insufficient and inadequate security for the payment of the amount due on said bonds as aforesaid.

XIX. By reason of all the matters hereinbefore alleged, your orator is advised by counsel learned in the law, and therefore alleges that it has an equitable lien on said insurance policies, and on the

moneys to be paid thereunder, and that it is entitled to an
20 assignment of said policies, and of the moneys due thereon, and to payment under said policies, as trustee under said mortgage and for the purposes of its said trust, to the extent of its loss, and the loss of said bondholders, by reason of said fire.

Wherefore your orator prays that it may have the benefit of the proceedings taken under its said original bill of complaint, and that this bill be taken as supplemental thereto, and prays the same relief as it has in its said original bill of complaint already prayed, and in addition thereto prays that this honorable court fix and determine the amount of the loss sustained by your orator as such trustee, and by the holders of the bonds secured by your orator's said mortgage, by reason of said fire; that your orator be decreed to have a first lien for the amount so fixed and determined upon the said policies of insurance, and the moneys paid or to be paid thereunder; that the defendants, and each and all of them, be directed to discover and disclose to your orator and to this court the amounts of the said respective policies of insurance and the amounts to be paid thereon respectively; that the said defendant Penn Plate Glass Company, be decreed and directed to assign to your orator as such trustee, the said policies of insurance or so much thereof as may be necessary to cover said loss; that the said defendant insurance companies be decreed and directed to pay to your orator as such trustee out of the said moneys due upon said policies an amount sufficient to cover said loss; that an injunction may issue out of this court, restraining and enjoining said defendants Pennsylvania Plate Glass Company, Kann, and Penn Plate Glass Company, and all and every their agents and servants from receiving, and said defendant insurance companies, and each and all of them, and all and every, their agents and servants, from paying out, any portion of said moneys due under said policies of insurance pending the decision of this court in the premises, or in any manner other than as this court may, by decree or order herein, hereafter to be made, determine and direct; that this
21 honorable court grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court directed to the defendants Pennsylvania Plate Glass Company; Penn Plate Glass Company; W. L. Kann; Monongahela Insurance Company, of Pittsburg; Insurance Company of North America, of Philadelphia; Teutonia Insurance Company, of Allegheny; Spring Garden Insurance Company, of Philadelphia; Armenia Insurance Company, of Pittsburg; Artisans' Insurance Company, of Pittsburg; Pittsburg Insurance Company, of Pittsburg; City Insurance Company, of Pittsburg; Insurance Company of the State of Pennsylvania, of Philadelphia; State Insurance Company, of Philadelphia; Franklin Fire Insurance Company, of Philadelphia; Pennsylvania Fire Insurance Company, of Philadelphia; Farmers' Insurance Company, of York; Ben. Franklin Insurance Company, of Allegheny; Schuylkill Fire Insurance Company, of Philadelphia; Mutual Protection Fire Insurance Company, of Boston; Springfield Fire and Marine Insurance Company, of Springfield; Assurance

Company of America, of New York; Eastern Insurance Company, of New York; Lafayette Fire Insurance Company, of New York; Westchester Fire Insurance Company of New York; Manhattan Insurance Company, of New York; Pacific Fire Insurance Company, of New York; Norwood Insurance Company, of New York; Broadway Insurance Company, of New York; Hanover Fire Insurance Company, of New York; Queen (America) Insurance Company, of New York; State Insurance Company, of New York; Erie Fire Insurance Company, of Buffalo; Victoria Fire Insurance Company, of New York; National Standard Insurance Company, of New York; Globe Fire Insurance Company, of New York; Insurance Company of the State of New York, of New York; Niagara Fire Insurance Company, of New York; Mutual Fire Insurance Company, of New York; Farragut Fire Insurance Company, of New York; Colonial Assurance Company, of New York; Commonwealth Insurance Company, of New York; Citizens' Insurance Company, New York; Ætna Insurance Company of Hartford; Hartford Fire Insurance *of* Company, of Hartford; National Fire Insurance Company, of Hartford; Connecticut Fire Insurance Company, of Hartford; Citizens' Insurance Company, of St. Louis; American Central Insurance Company, of St. Louis; Merchants' Insurance Company, of Providence; Virginia State Insurance Company, of Richmond; Washington Insurance Company, of Cincinnati; Capital Fire Insurance Company, of Concord; Merchants' and Manufacturers' Fire Insurance Company, of Baltimore; Atlanta Home Insurance Company, of Atlanta; St. Paul Fire and Marine Insurance Company, of St. Paul; Grand Rapids Fire Insurance Company, of Grand Rapids; Southern Insurance Company of New Orleans; Scottish Union and National Insurance Company; The Commercial Fire Insurance Company, of Scotland; The Caledonian Insurance Company, of Edinburg; The Scottish Alliance Insurance Company, of Glasgow; The North British and Mercantile Insurance Company, of London; The Commercial Union Association Company, Limited, of London; The Atlas Assurance Company, of London; The Union Assurance Society, of London; The Phœnix Assurance Company, of London; The Imperial Insurance Company, Limited, of London; The Northern Assurance Company, of London; The Liverpool and London and Globe Insurance Company, of Liverpool; The Palatine Insurance Company, of Manchester; The Manchester Fire Assurance Company, of Manchester; The Transatlantic Insurance Company, of Hamburg; The North German Fire Insurance Company, of Hamburg; The Hamburg-Bremen Fire Insurance Company, of Hamburg; The Aachen and Munich Fire Insurance Company, of Munich; The Aachen-Leipzig Insurance Company, of Aix-la-Chapelle; The Magdeburg Fire Insurance Company, of Magdeburg; Svea Association, of Gothenburg; The Netherlands Insurance Company, of Zutphen; The Urbaine Belge
22 Insurance Company, of Brussels; William Adams, J. Stanley Lockwood, Remey R. Foreman, Edwin C. Jameson, and Joseph S. Frelinghuysen; to appear and answer this bill; and that your orator may have such other and further relief in the premises as

the circumstances of the case may require and as may be agreeable to equity.

And your orator will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By E. S. MARSTON, *Vice-President.* [SEAL.]

Attest: SAM'L SLOAN, *Secretary.*

TURNER, McCLURE & ROLSTON,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA, }
*Southern District of New York,* } ss:

Edwin S. Marston, being duly sworn, deposes and says that he is vice-president of The Farmers' Loan and Trust Company, the complainants above named; that he has read the foregoing supplemental bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that this verification is not made by the complainant because it is a corporation; that his knowledge is derived from having taken part in the transactions spoken of and from statements made to him, and from examination of the papers, and the same constitute his grounds of belief; that the seal affixed to the said supplemental bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

E. S. MARSTON.

Sworn to before me this 19th day of May, 1898.

W. B. CARDOSO,
[SEAL.] *Notary Public, No.* 18, *New York County.*

24 *Demurrer to Supplemental Bill.*

The above defendants, The Penn Plate Glass Co. and W. L. Kann, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is set forth and alleged, doth demur:

First. To the additional relief prayed for by said supplemental bill and for cause of demurrer showeth:

(*a.*) That the said plaintiff has not as appears by its supplemental bill, made out any title to the relief thereby prayed, namely, either to have this honorable court fix and determine the amount of loss sustained by the plaintiff as trustee of the mortgage and by the holders of the bonds secured thereby, or that plaintiff be decreed to have a first lien for the amount so fixed and determined upon said policies of insurance and the moneys paid or to be paid thereunder; that the defendants be directed to disclose the amounts of said respective policies of insurance and the amounts to be paid thereon respectively, and that the Penn Plate Glass Company be decreed

and directed to assign to plaintiff as such trustee the said policies of insurance, or so much thereof as may be necessary to cover said loss; that the defendant insurance companies be decreed and directed to pay to plaintiff as such trustee out of said moneys due upon said policies an amount sufficient to cover said loss; that an injunction may issue out of this court restraining and enjoining said defendants from receiving and the insurance companies, defendant, from paying out any of said moneys due under said policies of insurance pending the decision of this honorable court in the premises.

(*b.*) That the provision relating to insurance as contained in said mortgage and as set out in said supplemental bill does not constitute a covenant to insure.

(*c.*) That said provision, if it does constitute a covenant to insure, is not a covenant to insure for the benefit of the trustee or
25 bondholders, and that therefore complainant has no title to the proceeds of insurance subsequently effected by the Penn Plate Glass Company in its own name.

(*d.*) That said provision relating to insurance, even if it be construed to be a covenant to insure for the benefit of the bondholders and the trustee, does not run with the land and is not binding upon the Penn Plate Glass Company, the purchaser of the mortgaged premises from the said W. L. Kann or upon the said W. L. Kann, the purchaser of the mortgaged premises at receiver's sale from the Pennsylvania Plate Glass Co.

(*e.*) That neither by the terms of said mortgage or the terms of the purchase or by reason of any matter, thing or allegation contained in said bill, or the terms of said policies of insurance, was there any promise, express or implied, on the part of said W. L. Kann, or the said Penn Plate Glass Company, to insure for the benefit of said trustee or the bondholders secured by the mortgage, or by reason of which the latter has any lien, equitable or otherwise, upon the insurance so effected by the said Penn Plate Glass Company, or any matter or thing which would entitle the said complainant to have an assignment of any part of the proceeds of said insurance or an injunction restraining the payment thereof to or the reception thereof by the said Penn Plate Glass Company.

(*f.*) That it appears upon the face of the supplemental bill that the insurance effected by the said Penn Plate Glass Company was an insurance of its own interest, and that the insurance effected by the said Penn Plate Glass Company was not effected in pursuance of any covenant contained in said mortgage or any agreement, express or implied, to insure for the benefit of the said trustee or the bondholders represented by it, but that the said insurance was upon the interest of the said Penn Plate Glass Company as owner, and that it refused to insure for the benefit of the said trustee or the bondholders as secured by said mortgage.

26 (*g.*) That complainant has neglected to make part of or set forth in said bill the said policies of insurance or that clause thereof excluding the interest of the bondholders which is as follows: "This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not

cover the interest of the bondholders," although it appears of record in this case that a policy containing the provision aforesaid was proffered to the court in proceedings under the original bill, and that the complainant had full knowledge of said provision and could and should in good faith have incorporated the same in this supplemental bill for inspection and construction of this court.

Second. And the said defendants, still protesting as above set forth, demur to paragraph- IV and V of said bill and for cause of demurrer, show:

(*a.*) That the averments of the said bill contained in paragraphs IV and V are immaterial and irrelevant, as respects any of the reliefs prayed for, either in the said original bill or in the said supplemental bill, for the reason that the same purports to be a construction put by the said plaintiff of the answers to the said original bill, and also of the course of procedure under the said original bill, said construction and procedure being matters exclusively within the determination of this honorable court under the original, if reasonable cause for the allegations of said paragraph IV of the supplemental bill aforesaid existed.

(*b.*) And for the further reason that the matters averred in the said paragraphs IV and V of said supplemental bill have not arisen subsequently to the filing of the said bill.

(*c.*) And for the further reason that if the effect of the decision of this honorable court in the month of March, 1897, overruling the defendants' demurrer to the plaintiff's original bill be as averred in the fifth paragraph of the said supplemental bill, the application of said effect is entirely within the province of this court under the said original bill, and is not a proper subject-matter of a supplemental bill.

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(*d.*) And for the further reason, that so far as the allegations contained in the said fifth paragraph of the said supplemental bill avers an alleged manifest futility of the defendants' defence in said original bill, and of the taking of an alleged vast amount of testimony under the allegations of their said answers; and thus as alleged, delaying the final adjudication of said cause, and as alleged, of the plaintiff in carrying out the provisions of said trust, and that the Pennsylvania Plate Glass Co. have made as alleged no defence to the original bill, and that as alleged the said plaintiff otherwise would have obtained a decree of foreclosure and sale of the property many months ago and long before the fire, subsequently referred to in said supplemental bill occurred, are entirely irrelevant and immaterial matters which are entirely within the cognizance of this honorable court upon the proper applications to this honorable court in and under the said original bill.

Third. And said defendants, The Penn Plate Glass Company and W. L. Kann, further demur to all the allegations of paragraphs VI and VII of the said plaintiff's supplemental bill, for the following reasons:

(*a.*) That all of the allegations contained therein would have been proper subjects of evidence to sustain the same by the plaintiff under the original bill, had the said plaintiff seen proper after the

coming in of the answers of the said Penn Plate Glass Company and W. L. Kann to said original bill, to have amended their bill by the leave of the court by the insertion of the said allegations in proper form in the said original bill.

(*b.*) And for the further reason that all of the said matter averred in said paragraphs VI and VII occurred prior to *to* the filing
28 of the said supplemental bill, if they occurred at all, and also prior to the filing of the said original bill.

(*c.*) And for the further reason that the said original bill has been so prece-ded with and without amendment after the said answers to said bill were filed, but the said plaintiff entered a replication thereto and has taken all of its testimony-in-chief, and that the defendants have likewise taken all their testimony in said original bill and have rested, without any application by the plaintiff in said original bill to appropriately procure amendments to its said original bill in this regard.

(*d.*) And for the further reason that no part of the allegations contained in the said paragraphs VI and VII of the said supplemental bill are proper subjects of averment and relief in said supplemental bill.

(*e.*) And for the further reason that the proceedings for the appointment of a receiver of the Pennsylvania Plate Glass Company referred to in paragraph VI of said bill, are not brought before the attention of this honorable court by a duly proved copy of the proceedings and therefore that the construction thereof and of any part thereof are not supported by anything in said supplemental bill contained, and that the proceedings and the proper construction thereof are entirely irrelevant to the reliefs prayed for in said supplemental bill.

Fourth. And defendants, still protesting, etc., further demur to the allegations in paragraph VIII of said supplemental bill contained, wherein it is averred that the said Kann recognized the validity of the plaintiff's said mortgage and the bonds secured thereby as valid obligations on said property by paying interest coupons which fell due on said bonds during his said possession as owner of said mortgaged premises for the following reasons:

(*a.*) That the said allegations do not sustain such allegations of recognition made as alleged, and because the said alleged
29 payments were made to the said plaintiff before the filing of said original bill.

(*b.*) For the reason that the alleged facts contained therein are proper matters of assertion, proof or establishment under said original bill, and that nothing in said paragraph contained is a proper subject for this supplemental bill.

Fifth. The said defendants demur to the allegations of paragraph IX of said bill for the following reasons:

(*a.*) That the said plaintiff has failed to file with his said supplemental bill a true copy of the proceedings of the court of common pleas of Westmoreland county, Pennsylvania, authorizing a receiver of the Pennsylvania Plate Glass Company to make sale of the property of said Pennsylvania Plate Glass Company, and prescribing the

terms upon which said sale should be made; nor of the said alleged deed by the said Kann to the said Penn Plate Glass Company, so that this honorable court could make construction thereof from the terms and provisions thereof.

(*b.*) And for the further reason that all of the transactions referred to in the said paragraph IX were all prior in date, not merely to the filing of the supplemental bill, but the filing of the original bill, and were within the knowledge and means of knowledge, if correctly stated, of the said plaintiff before the filing of the said original bill.

(*c.*) And for the further reason that the averments contained in paragraph IX of said supplemental bill are immaterial and irrelevant to the question whether or not insurance taken out by the Penn Plate Glass Company upon the real estate and machinery of the Penn Plate Glass Company should be held to be for the benefit of the said plaintiff in trust for the bondholders secured by the said mortgage of which the said plaintiff is trustee.

Sixth. The said defendants demur to the allegations of paragraphs X, XI, XII, XIII and XIV of the original bill for the following reasons:

30 (*a.*) That the allegations contained in the said recited paragraphs of said supplemental bill are not sustained by anything in the said mortgage contained as by reference to the said mortgage and the terms thereof annexed to and made a part of the said original bill will more fully appear.

(*b.*) That an inspection thereof discloses that no duty upon the part of the said defendant Kann and the said defendant Penn Plate Glass Company, or either of them, to insure the said premises for the benefit of the said trustee or bondholders of said mortgage, as alleged in the said supplemental bill, was created by anything in said mortgage contained.

(*c.*) And for the further reason that the act of Joseph W. Stoner, receiver of the Pennsylvania Plate Glass Company, in insuring under order of court of common pleas of Westmoreland county, of said premises, is entirely irrelevant to affect or bind the said defendants Kann and the Penn Plate Glass Company, or either of them.

(*d.*) And for the further reason that by the said terms of the said mortgage and by anything averred in any of the recited paragraphs of the said supplemental bill, or in any part of the said supplemental bill, no duty was imposed in equity or at law upon either the said defendant Kann or the said defendant Penn Plate Glass Company, or both, at any time to insure and keep insured for the benefit of the said plaintiff as trustee of said bondholders secured by the said mortgage the said mortgaged premises, and that in not so doing neither the said Kann nor the Penn Plate Glass Company was guilty of any breach of any covenant, stipulation or agreement in said mortgage contained.

(*e.*) And for the further reason that if the said Kann in his individual capacity was bound to the observance of any alleged covenants, stipulations or agreements in said mortgage contained, his

failure to observe and perform the same could not in anywise affect,
in law or equity, the Penn Plate Glass Company, which is a
31 distinct entity as a corporation duly organized under the laws
of Pennsylvania, the stock of which is held indiscriminately by many persons who purchased the same without knowledge, actual or impeded, of any of the acts or failures to act of the said Kann as alleged in said supplemental bill.

Seventh. And defendants demur to the XV paragraph of said supplemental bill, and to all the allegations therein contained, for the reasons:

(*a.*) That the same and each part of the same are irrelevant and immaterial for the reliefs prayed for in the said supplemental bill.

(*b.*) And for the further reason that the bond referred to was accepted by the plaintiff and was duly filed in this honorable court under the said original bill for the benefit of the plaintiff; and the said Kann and the said Emanuel Wertheimer, obligators therein, still stand bound to the said plaintiff for the performance of all the conditions of the said bond.

(*c.*) And for the further reason that it is not averred in the said paragraph that the said bond is in default; and for the further reason that the said Emanuel Wertheimer, one of the obligators, is not a party to the original bill, nor is he a party to the supplemental bill.

(*d.*) And for the further reason that nothing contained by way of allegations in said XV paragraph would justify this honorable court in decreeing that the insurance taken out by the Penn Plate Glass Company referred to in said supplemental bill, and now payable and to become payable by reason of said fire, and taken out by the Penn Plate Glass Company, should be applied in whole or in any part to the protection of said trustee or of said mortgage, and the bondholders secured by said mortgage.

Eighth. Defendants further demur to the allegations of the XVI paragraph of said supplemental bill, because they say that nothing
in said paragraph contained constitutes a covenant, stipula-
32 tion or agreement relating to insurance, or creates any obligation to insure the said premises, binding as such upon the said Penn Plate Glass Company or the said Kann, jointly or severally, under the terms of the mortgage or as purchasers of the mortgaged premises.

Ninth. And defendants further demur to the allegations of the XVII and XVIII paragraphs of said supplemental bill because they say, among other things, that the said plaintiff has failed to set forth in the said bill copies of the material parts of the said alleged policies of insurance taken out by the said Penn Plate Glass Company so that this honorable court could see by inspection thereof to whom the amounts of insurance therein provided were made payable and the legal obligations arising by reason of the said fire ascertained and adjusted.

And for the further reason that the alleged default of the said Kann and Penn Plate Glass Company to insure the said mortgaged property as recited in said supplemental bill, did not constitute a

breach of any covenant, stipulation or agreement contained in the said mortgage, nor did the occurrence of the fire referred to in said paragraph XVIII, nor did the occurrence constitute any manner of fact having any relevancy or materiality to the reliefs prayed for in said supplemental bill in the absence of adjudication that the said Penn Plate Glass Company was legally and equitably bound to apply the insurance moneys due or to become due under the said insurance policies by reason of said fire, for the protection of said plaintiff as trustee of said mortgage and of the bondholders secured by the said mortgage.

And for the further reason that the said supplemental bill having averred notice to the said plaintiff long prior to the happening of said fire, that the said Penn Plate Glass Company and the said Kann denied any obligation upon the part of either or both to keep such mortgaged premises insured for the benefit of the plaintiff as trustee of said mortgage and of the bondholders secured
33 thereby, and in consequence thereof, as averred in said supplemental bill and as shown by the records of this court in the said original bill, the said plaintiff endeavored to secure an adjudication that such insurance should be taken and kept up by the said Penn Plate Glass Company or Kann, or either, for the protection of said plaintiff, trustee as aforesaid, and of the bondholders under said mortgage, and did accept and caused to be filed the bond of the said W. L. Kann and Emanuel Wertheimer, as referred to in the said supplemental bill and filed in the original bill by order of court for the application of insurance moneys upon the happening of certain conditions in said bond mentioned (none of which have as yet occurred); the said plaintiff has failed to aver in its supplemental bill that for its protection and for the protection of its bondholders, it had itself taken out or caused to be taken out, insurance on the said mortgaged premises. Failing to make averment and from the general allegations of said supplemental bill and from the relief prayed for in said supplemental bill, the said supplemental bill discloses that by its own negligence and with full knowledge, the plaintiff permitted the said premises to remain uninsured for the benefit of plaintiff as trustee, and of the bondholders secured by said mortgage.

And for the further reason that, admitting without prejudice and for the purpose of demurrer only, that the said Kann and the said Penn Plate Glass Company were either jointly or severally bound to insure the said premises for the benefit of the said plaintiff as trustee, as averred in said supplemental bill, the utmost liability for which the said Kann and the Penn Plate Glass Company, or either, are liable in said event, would be the costs to the plaintiff of said insurance, had such insurance been taken out by the plaintiff, and that the remedy for the collection of the costs thereof against the said Kann and the said Penn Plate Glass Company, or either,
34 would be by action at law to recover the amount thereof as an assumpsit or for breach of covenant.

Tenth. Defendants further demur to the allegations of paragraph XIX, and deny that by reason of anything contained in the said

supplemental bill, the said plaintiff has an equity in said insurance policies or in the moneys to be paid thereunder, or that it is entitled to an assignment of said policies and the moneys due thereon, and the payment under said policies, as trustee under said mortgage, and for the benefit of the bondholders under said mortgage, to the extent of its said loss and the loss of said bondholders by reason of said fire, or to any part or parcel of said policies of insurance or of any of the moneys due or to become due thereon; or that the said orator is entitled to any of the reliefs prayed for in the said bill.

Eleventh. And they further demur to so much of the said supplemental bill as includes the various insurance companies therein named as defendants, for the reason that their joinder is immaterial and tends to operate as a restraint upon said companies in complying with their legal contract of insurance before the plaintiff has established any duty upon either the said Kann or the said Penn Plate Glass Company, or either, to insure the mortgaged premises for the benefit of said plaintiff as trustee for the bondholders secured by said mortgage; and for the further reason that this bill is not a bill of interpleader nor a stakeholders' bill.

Twelfth. And they further demur generally to the entire supplemental bill and to the reliefs therein prayed for.

S. Schoyer, Jr., and S. B. Schoyer, counsel for the Penn Plate Glass Company, and W. L. Kann, in whose behalf the above
35 and foregoing demurrers have been filed, do testify that in their opinion the same are well founded in points of law.

S. SCHOYER, JR.,
S. B. SCHOYER,
*Counsel for Penn Plate Glass Co. and W. L. Kann.*

Pittsburgh, June 5, 1898.

UNITED STATES OF AMERICA, }
*Western District of Penna.,* } *ss:*

Personally appeared before the undersigned authority Emanuel Wertheimer, vice-president of the Penn Plate Glass Company, one of the above-named defendants and a party to said demurrer, who being duly sworn, deposes and says on behalf of the said company and as agent in this behalf of W. L. Kann, that the foregoing demurrers are not interposed for delay.

EMANUEL WERTHEIMER.

Sworn to and subscribed before me this 7th day of June, 1898.

H. D. GAMBLE, *Clerk.*

*Order Overruling Demurrer.*

BUFFINGTON, *J.:*

And now June 29th, 1898, after argument and on due consideration the foregoing demurrer is overruled with leave to respondents to answer over within ninety days.

*Answer to Supplemental Bill.*

To the honorable the judge of said court:

The joint and several answers of William L. Kann and The Penn Plate Glass Company, two of the defendants to the said supplemental bill, now and at all times hereafter saving to themselves all and all manner of benefit or advantage, exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said supplemental bill contained, and reserving and not waiving, but insisting upon the insufficiency of the said bill upon questions of law, for answer thereto, or to so much thereof as
36 *this* defendant *is* advised it is material or necessary for *him* to make answer to, answering saith:

First. Respondents admit the substantial accuracy of the allegations of paragraph I, of said bill.

Second. The allegations of paragraph II of said bill are admitted except in so far as it is therein alleged that the principal of all said bonds and the accrued interest thereon became immediately due and collectable from and out of the mortgaged property; and respondents say that it is denied that all of said bonds and the accrued interest thereon became immediately due and collectable from and out of the mortgaged property, because the said mortgage is not a valid lien upon said property to any greater extent at the most than as to the *bona fide* holders for value without notice of the matters set up by respondents' answer to the original bill in this case, which answer is hereby made part hereof; and they further deny the allegation in said paragraph contained that the Penn Plate Glass Company and W. L. Kann purchased the property covered by said mortgage or deed of trust, said purchase having been made by W. L. Kann at receiver's sale as hereinafter referred to.

Third. The allegations of paragraph III of said bill are admitted except in so far as the same alleges that said principal and interest still remains due at the present time. It is admitted that the said principal and interest *is* unpaid, but respondents deny that the same *is* due, but say the same *has* matured under the terms of said mortgage.

Fourth. Respondents deny the allegations contained in paragraph IV of said supplemental bill to the effect that complainant was anxious to proceed with the argument of the demurrers and exceptions and matters mentioned in said paragraph, and that it repeatedly, through its attorneys, urged respondents to agree upon some early day for the presentation of said matters to the court, and that said respondents delayed in so doing; and respondents, for answer thereto, say that said proceedings took their regular and
37 orderly course, that arguments were made on the days fixed and appointed by the court and as agreed upon by the parties, all of which will be shown by the record in this cause.

Fifth. Your respondents, in reply to paragraph V of the said supplemental bill, say that the same contained no matter material for the relief prayed for in said bill; that the narration of procedure is

not correct, and is contradicted by the record; that the said complainant has not as yet formally advised the defendants in the said original bill that it had rested its case, although an allegation that it had so rested its case was made orally in an argument before this court recently on matters arising under this supplemental bill. They further deny so much of said paragraph as relates to the effect of the demurrer to the original bill and the decree of the court thereunder; and further deny that the answers to said original bill were invalid, or that the defences were futile. They deny the effect of the decision of this court upon the demurrer filed by the defendants in original bill to be as averred in the said paragraph of the supplemental bill; and further answering the respondents say that all property of the Pennsylvania Plate Glass Co., as was well known to the complainant, had passed into the hands of a receiver appointed by the court of common pleas of Westmoreland county long prior to filing of the said original bill; and that the officers of the Pennsylvania Plate Glass Co., have, in violation of their duty, and in complicity with the complainant and for the purpose of embarrassing and injuring these respondents and the Penn Plate Glass Co., neglected to make defence to the said original bill; and that the said Pennsylvania Plate Glass Co., had no interest in the premises described in the said mortgage after the sale of the same by the receiver as hereinafter mentioned, to this respondent, and was not individually responsible under the terms of said mortgage and of the bonds secured thereby for the debt which the said mortgage was intended to secure.

38 Sixth. These respondents deny each and every allegation contained in paragraph VI of said supplemental bill, and call for proof of the same by the complainant. They specifically deny that the sale referred to under the order of the court of common pleas of Westmoreland county, on or about the 18th day of June, 1894, to these respondents was made expressly subject to the said mortgage of which the complainant is trustee; or that by any deed or any part of the proceedings in said court did they become bound for the payment of the principal of said mortgage or of the bonds secured thereby. These respondents admit that prior to the said sale by the said receiver and W. L. Kann's purchase of the mortgaged premises, the said Kann had knowledge of the existence of the said mortgage and also that the same secured the bonds therein recited, and of the contents of the said bonds and the said mortgage.

Seventh. These respondents in answer to paragraph VII deny, as they have already denied, that W. L. Kann purchased the said property at receiver's sale subject to the said mortgage. They deny that by means of the said judgments and attachments he, the said Kann, has succeeded in collecting the greater part of the indebtedness of the Pennsylvania Plate Glass Co., to himself out of the property of the said company other than that covered by the said mortgage, and admit, that by reason of his purchase of the said mortgaged property at receiver's sale as aforesaid, he entered into possession of the said property and held the same as such purchaser from the 2nd

day of July, 1894, to the 1st day of July, 1895, at which time he sold and conveyed the same to the Penn Plate Glass Co.

Eighth. These respondents deny the allegations of paragraph VIII of the supplemental bill, and say that the payment of interest coupons by said Kann on the bonds secured by said mortgage were voluntary payments for reasons satisfactory to himself, and
39 were not recognitions by him either of the validity of the mortgage or of the bonds secured thereby.

Ninth. These respondents admit that on the 1st day of July, 1895, he sold to the Penn Plate Glass Co. said mortgaged premises with certain improvements made by said Kann himself, to the Penn Plate Glass Co., for $83,500, but say that such sale was made by him as the owner in fee of said property at a price satisfactory to himself, and to the purchasers thereof. They say that the Penn Plate Glass Co. was duly organized under the laws of Pennsylvania with an authorized capital stock, all of which has been subscribed for and paid by many persons who are strangers to the transactions mentioned in this bill; that it is true that the said Penn Plate Glass Co. purchased the said mortgaged property and operated the said plant, and continued to operate the same, until the occurrence of the fire; they deny that said Kann was, at the time of such purchase, and still is, the principal stockholder therein; they deny that he was, in every respect, and in any respect, in control of the said Penn Plate Glass Co., and aver that he has no identification with it other than as a stockholder and an officer. They specifically deny that the sale of the said property was made expressly subject to the said mortgage mentioned in said supplemental bill in any sense other than, if valid or in part, it would be a lien upon the property so described. They deny that any provision in the said deed by respondents to the said Penn Plate Glass Co. bound the said Penn Plate Glass Co. to any liability either to pay the debt secured by the said mortgage or the bonds, or the interest, or the insurance, subsequently taken out. They admit that the Penn Plate Glass Co. had knowledge of the existence of the said mortgage and of the number and aggregate amount of the bonds secured thereby and of the provisions of the said mortgage, including such parts of
40 the same as related to the insurance on the property at the time of its purchase from said Kann.

Tenth. These respondents, in answer to paragraph X of the said supplemental bill, say that such provisions of the mortgage as are referred to in said paragraph are better shown by the mortgage itself; and if the said paragraph X is a true recitation of the said mortgage, then they admit the same, and if not, then they deny the same.

Eleventh. Respondents, in answer to paragraph XI of the supplemental bill, deny that under the said mortgage or deed of trust it was the duty of the Pennsylvania Plate Glass Co. to insure the mortgaged property and to keep the same insured for the benefit of the plaintiff as trustee and of the holders of the bonds secured thereby; or that the said Pennsylvania Plate Glass Co. made any covenant, stipulation and agreement to effect and preserve such in-

surance; but admit that by the terms of the mortgage the plaintiff as trustee could have required insurance to be taken out if it saw proper, but deny that there is any covenant contained in said mortgage binding any corporation or person to take out such insurance; and further deny that even if such a covenant did exist it ran with the land, and aver that it was not binding upon the said Kann as the purchaser at receiver's sale or any subsequent purchaser from him; nor was any such covenant or agreement or stipulation, if existing, a part of the mortgage or secured by any lien which the said mortgage would have upon the said mortgaged premises.

Twelfth. Your respondents answering paragraph XII of the supplemental bill, deny that it is immaterial to them what the said Pennsylvania Plate Glass Co. did in the matter of insurance, or whether that company has made any failure or neglect or broken any covenant, stipulation and agreement in the said mortgage contained with respect to insurance; and submit that if any such failure and neglect or breach of covenant, etc., has occurred, said
41 plaintiff had an adequate remedy at law or in equity against the Pennsylvania Plate Glass Co., over whom these respondents have no control or power whatsoever.

Thirteenth. In answer to paragraph XIII of the supplemental bill, your respondents say that, as they are informed and advised, believe and expect to be able to prove on the trial of this cause, the said Pennsylvania Plate Glass Co., never did make adequate insurance for the benefit of the bondholders secured by the mortgage of which the said plaintiff is trustee; and that the inadequacy of such insurance was so great that the holder, or holders, of more than a majority of the bonds secured by the said mortgage insured their interests for their own account, and continued such insurance until at or about the time Joseph W. Stoner, receiver appointed by the court of common pleas of Westmoreland county aforesaid, sold the said property under order of court at public sale; and further answering, these respondents say that without sufficient knowledge to answer more fully, that if the said receiver did insure partially the said premises, it was for the protection of himself as such receiver, and that he had no insurance title or interest which would justify him in insuring for the benefit of the plaintiff as trustee and for the benefit of the bondholders secured by the said mortgage.

Fourteenth. Your respondents make answer to paragraph XIV of the supplemental bill by reiterating their denials heretofore contained in this answer to the allegations which in said paragraph XIV are laid as premises for the conclusion that these respondents were bound in equity under said recitations and circumstances set forth in paragraph XIV of said supplemental bill, to insure and to keep insured for the benefit of the plaintiff as trustee of the bondholders the said mortgaged property; and they deny that by neglecting so to do they or either of them were guilty of a breach of any covenant, stipulation and agreement in said mortgage contained in ex-
42 istence at the time when said Kann sold said property to the said defendant, Pennsylvania Plate Glass Co. They admit that long before the original bill was filed in this case they gave dis-

tinct, repeated and written notices to the said plaintiff that they were not bound to insure the said premises for the benefit of the plaintiff, and that they would not nor would either of them insure the said premises for the benefit of the plaintiff as trustee, and of the bondholders secured by the said mortgage, to the end that the said plaintiff as trustee and the said bondholders should protect themselves under such notice by insurance of their respective interests; and they admit that they did not preserve existing insurance, or effect new insurances for the benefit of the bondholders secured by the said mortgage; and they further say that said plaintiff has grossly neglected its duties in not advising said bondholders of the said notification and enabling them to protect themselves either through the instrumentality of the plaintiff as trustee or otherwise for any loss which might occur by fire after the said Kann became the purchaser of the said property.

Fifteenth. Your respondents in answer to paragraph XV of the supplemental bill, say that so far as the same purports to be a recital of the proceedings in this court under this supplemental bill, they refer to the records of this court for full answer. That they are not advised as to what motive actuated the plaintiff in its various procedures except by the contest of the papers which are now of record in this court and which speak for themselves. They deny that the object of the said original bill was to obtain the means for effecting and providing insurance of the interests of such trustee and of the interests of the bondholders, in view of the respondents' refusal to effect insurance as set forth in said supplemental bill; and refer to the said original bill and prayers thereof, in support of this denial. They admit that he, said Kann, and the said Penn Plate Glass Co., continued to maintain an attitude of refusal to effect insurance for the benefit of the plaintiff and of the bondholders in
43 spite of the demands of the plaintiff. They admit that the said Kann did file in this court a certain bond or stipulation executed by him and Emanuel Wertheimer, to pay to the said plaintiff as trustee a sum of money in case of loss equal to the total amount of such of said bonds as might be valid out of certain policies of insurance then existing in favor of the Penn Plate Glass Co., provided it should be finally adjudicated that the said Penn Plate Glass Co., was bound or liable by anything contained in said mortgage or the terms of its purchase of said mortgaged property to keep or maintain insurance for the benefit of the holders of the bonds secured by said mortgage; and they aver that the said bond was approved and accepted by the said plaintiff; that it is a valid undertaking and is an effective protection to the said plaintiff as trustee for the bondholders under and subject to the conditions therein expressed; and they make the said bond a part of this answer. They further say that the said plaintiff as trustee still maintains the said bond for its protection and the protection of its bondholders.

Sixteenth. These respondents, in answer to paragraph XVI of the said supplemental bill, deny all the allegations of the said paragraph except that they have not kept up insurance as it is alleged they have failed to do.

Seventeenth. Your respondents in answer to paragraph XVII, say that it is true that the Penn Plate Glass Company has taken out policies of insurance, including in part the said mortgaged property with all of the insurance companies defendant, and that said policies amount in the aggregate on their face to $450,000, and that they constitute legal and valid obligations on the part of said defendant insurance companies to the amount of the adjusted valuations; but he says that all of said policies expressly excluded the plaintiff as trustee, or the bondholders secured by said mortgage, from participation in insurance moneys arising from loss of insured property, and each contains the following clause:

44 "It is understood and agreed that there is a bonded indebtedness on this plant of $250,000; but this insurance does not cover the interest of bondholders."

And further answering these respondents say that much of the said policies covers goods manufactured and raw material and other property not included within the terms of the said mortgage, except that of the Palatine Insurance Company, Limited, which was limited to a loss of stock of goods exclusively.

Eighteenth. Your respondents, in answer to paragraph XVIII of the supplemental bill, and repeating all their answers to all the material recitations in said paragraph contained heretofore denied, admit that a fire occurred on the 12th day of April, 1898, which destroyed a very great portion of the property covered and described in the mortgage of which the said plaintiff is trustee.

These respondents specifically and earnestly deny that the greater part of the security of said mortgage was destroyed by fire without fault on the part of the plaintiff, and deny that the remaining property is wholly insufficient and inadequate security for the payment of the amount of money due on the bonds as recited in said paragraph; but say that the said plaintiff as trustee was grossly negligent of its duties as such trustee, after having had full notice that the said Kann, or the Penn Plate Glass Company, would not insure for the benefit of the said plaintiff as trustee, in not insuring for itself or giving notice under the terms of the mortgage to bondholders to enable them to protect themselves by insurance of their interest; and they further say that the remaining property undestroyed amounts to a very considerable proportion of the total value of the property secured by the said mortgage.

Nineteenth. Your respondents say, in answer to paragraph XIX of the supplemental bill that the said plaintiff does not have an equitable lien on the insurance policies of the Penn Plate

45 Glass Company hereinbefore referred to and on the insurance moneys to be paid thereunder, nor is it entitled to an assignment of said policies or of the moneys due thereon, or to payments under said policies as trustee under said mortgage and for the purposes of its said trust to the extent of its loss and the loss of said bondholders by reason of said fire or to any amount whatever.

Your respondents deny that the said plaintiff is entitled to the re

lief prayed for; and prays that they may be dismissed hence with their reasonable costs.

PENN PLATE GLASS CO., [SEAL.]
By W. L. KANN, *President.*
W. L. KANN.

UNITED STATES OF AMERICA, }
*Western District of Pennsylvania,* } *ss:*

Personally appeared before the undersigned authority, W. L. Kann, who on his own behalf and as president of the Penn Plate Glass Company, *who* being duly sworn says that the statements set forth in the foregoing joint and several answers of W. L. Kann and the Penn Plate Glass Company, so far as they are stated as of his own knowledge, are true, and so far as stated as upon information and belief, the same are true to the best of his knowledge and belief.

W. L. KANN.

Sworn and subscribed to before me this 12th day of July, 1898.

WM. C. GILL,
[SEAL.] *Notary Public.*

*Replication.*

The replication of the above-named complainant to the answer of the above-named defendants to the supplemental bill.—The repliant saving and reserving unto itself now and at all times hereafter all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto says that it will aver and prove its said bill to be true, certain and sufficient
46 in the law to be answered unto, and that the said answer of the respondent is uncertain, untrue and insufficient to be replied unto by the repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true; all which matters and things the repliant is now and will be ready to aver and prove as the honorable court shall direct, and humbly prays as in and by its said bill it has prayed.

Pittsburgh, August 27, 1898.

J. S. & E. G. FERGUSON,
*Attorneys for Complainant.*

*Testimony Taken by the Plaintiff under the Supplemental Bill.*

Notice having been given to Messrs. S. & S. B. Schoyer, attorneys for W. L. Kann and the Penn Plate Glass Company, of the taking of testimony under said supplemental bill on the part of the plaintiff this 13th day of September, 1898, at 10 o'clock a. m., before H. D. Gamble, Esq., examiner, in pursuance of said notice appeared J. S. Ferguson and E. H. Blanc, Esqs., of counsel for plaintiffs, and S. Schoyer, Jr., of counsel for W. L. Kann and the Penn Plate

Glass Company, and thereupon the taking of the said testimony proceeds.

Counsel for plaintiffs offer in evidence the averments of the supplemental bill so far as not controverted by the answer of W. L. Kann and the Penn Plate Glass Company, and specify under said offer as follows:

The first paragraph of said bill as admitted in toto.

The second paragraph of the said supplemental bill, to wit, the averments that the mortgage or deed of trust was duly made, executed and delivered by the Pennsylvania Plate Glass Company on or about the day of its date, and duly recorded, and that the
47 same is a valid conveyance except as hereinafter specified for the purposes therein stated; that the trusts therein and thereby created were duly accepted by the complainant before the recording of the said mortgage or deed of trust; that the said mortgage or deed of trust was given to secure the payment of an issue of bonds of the Pennsylvania Plate Glass Company aggregating $250,000 of principal, all duly executed by said Pennsylvania Plate Glass Company and duly certified by complainant, delivered and issued; that default was made by the said company in the payment of the semi-annual coupon interest which fell due upon all of its bonds on the first of July, 1895, and on the first of January and July, 1896; and that demands in writing in accordance with the terms of the mortgage or deed of trust were duly made upon the defendant, The Pennsylvania Plate Glass Company, and upon the defendants, The Penn Plate Glass Company and W. L. Kann, who had purchased the property covered by said mortgage or deed of trust for the payment of the said instalments of interest on some of the bonds which fell due as aforesaid respectively, and payment of the same was refused; and that the said respective defaults, with the exception of said default of July, 1896, had continued for a period of over six months, and still continued at the period when your orator's said original bill of complaint was filed; and your orator elected in accordance with the provisions of the said mortgage or deed of trust that the principal of all of the said bonds and the accrued interest thereon should be and the same did upon said election become immediately due and collectible from and out of the said mortgaged property, and was so due and unpaid at the time of the filing of the original bill of complaint. The only denial of the answer as to these facts being that they were not effective except as to bonds held by *bona fide* holders for value without notice of the matters set up in the original answer to which reference is made.

Counsel for W. L. Kann and the Penn Plate Glass Com-
48 pany object to the offer because the entire second paragraph referred to purports to be a recitation of averments contained in the original bill, to which original bill answers and replication have been filed and testimony taken and the cause now ready for argument; and for the further reason that the admissions alleged to have been made by the second paragraph are conclusions of law from the phraseology of the second paragraph and not admissions, constructively or explicitely to the extent claimed by the offer.

In connection with this offer counsel for complainant offer in evidence the pleadings and record in the matter of the original bill of complaint for the purpose of showing that the denial in answer to the supplemental bill, so far as it purports to be a denial, is incompetent, irrelevant and inconsistent.

To which counsel for defendants further objects that the additional offer of counsel for the complainant is an attempt to create a new issue in the supplemental bill in addition to the issues created by the answers to the original bill; and further for the reason that it is an attempt to have the advantage of a demurrer to the said answer to the original bill without compliance with the formality and requirements of procedure in equity; and for the further reason that the supplemental bill is by its terms an addition to the said original bill, and the proceedings in the original bill are therefore before the court without formal offer.

As a further admission, counsel for complainants offer the facts alleged in the third paragraph of the supplemental bill, to wit: Since your orator's said original bill of complaint was filed as aforesaid, additional instalments of interest on said bonds have fallen due on the first days of January and July, 1897, and the first day of January, 1898, but no part of the principal of any of the said bonds or of the said interests accrued thereon, either at the time of the filing of your orator's said original bill of complaint, or since that time, have ever been paid.

49 Counsel for defendants object to this offer because the admission is not as claimed by the plaintiff.

Counsel for complainant, as a further admission, offer the allegations of the sixth paragraph of the supplemental bill, to wit: "And your orator further alleges that at the time of said sale and conveyance, being the receiver's sale referred to in the bill, the said Kann had full, actual, and complete notice and knowledge of the said mortgage and of the bonds secured thereby and of every provision, covenant, stipulation and agreement therein contained, including the provisions, covenants, stipulations and agreements hereinafter mentioned relating to the insurance of said mortgaged property."

Counsel for complainant further offer the averments in the seventh paragraph of the bill to the effect that said Kann, purchaser at the receiver's sale, continued to hold the mortgaged property as such purchaser from July 2, 1894, to July 1, 1895.

Counsel for complainant further offer the averments of the eighth paragraph of the supplemental bill that during his possession of the mortgaged property the said Kann paid interest coupons which fell due on the bonds secured by the mortgage in question during his possession.

Counsel for responding defendants object to this, as the alleged admission is to be taken in connection with all the verbiage of the eighth paragraph and is a complete denial of the averments of the eighth paragraph of the supplemental bill to the intent of the eighth paragraph of the bill.

Counsel for complainants further offer the averments of the ninth paragraph of the supplemental bill, to wit: That on or about July 1,

1895, said Kann, by deed dated that day, conveyed all of said original mortgaged property, together with certain improvements made thereon by himself to the defendant, The Penn Plate Glass Company, for the consideration named in said deed of $83,500, being the sum of $37,500 paid by said Kann at the receiver's sale for the
50 mortgaged property, plus the cost of said improvements.

This offer as to said admission being made upon the ground that the specific averments of the bill are not denied, but on the contrary, evaded in the answer; and complainants also further offer as further admissions of the averments of said paragraph nine, the following: That the said defendants, Penn Plate Glass Company, was organized by said Kann for the express purpose of purchasing said property and operating said plant; that said Kann, at the time of said purchase, and still is, a stockholder and officer of said Penn Plate Glass Company; that the said deed given by said Kann to the said Penn Plate Glass Company expressly recited that said property was thereby conveyed "subject to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company at the city of New York for $250,000, dated January 1, 1891, recorded in Westmoreland county in Mortgage Book, volume 43, page 1," being the mortgage or deed of trust made to the complainant as alleged in the bill; and the further allegation in the said paragraph nine as admitted, to wit: And your orator further alleges that at the time of the said sale and conveyance, the said Penn Plate Glass Company had full, actual and complete notice and knowledge of the said mortgage and of the bond secured thereby, and of every provision, covenant, stipulation and agreement therein contained, including the provisions, covenants, stipulations and agreements hereinafter mentioned relating to the insurance of the said mortgaged property.

To which offer in its entirety counsel for the responding defendants object, and deny that the admissions as claimed in the offer have been so made by the answer.

Counsel for complainant, in view of the objection, offers seriatum, that is to say, one by one, the admissions claimed in the foregoing offer.

To which counsel for responding defendants still object that admissions cannot be taken up seriatum out of a single para-
51 graph of the bill, but that the same must be construed as an entirety, and the answer thereto as an entirety.

As a further admission, complainant offers the averment of the twelfth paragraph of the bill, that the defendant, The Penn Plate Glass Company, has neglected and failed to insure, or keep insured, the said mortgaged property for the benefit of your orator as such trustee, or the holders of the bonds secured by the mortgage or deed of trust.

(Objected to by counsel for responding defendants that the admission as claimed to have been made in the answer to the twelfth paragraph of the bill does not exist and is not correctly stated.)

Complainant further offers the admission in the thirteenth paragraph of the bill that the Pennsylvania Plate Glass Company, al-

though subsequently failing and neglecting to insure and to keep insured, the mortgaged property for the benefit of complainant as trustee, and of the bondholders, prior to the time when the said Kann became connected and identified therewith, recognizing the obligation imposed upon it by the mortgage, under the covenant, stipulation and agreement relating to insurance, did insure the property for the benefit of the complainant as such trustee and of said bondholders.

Counsel for respondent defendants object that the admission as claimed by the plaintiff is not sustained by reference to the answer.

Further, complainant offers as admitted, the following allegations of the fourteenth paragraph of said supplemental bill, to wit: And although your orator persistently demanded of said Kann that he carry out the terms or provisions of the said mortgage concerning insurance, and demanded that he preserve insurance already effected as aforesaid, and that he effect further insurance for the benefit of your orator as such trustee, and of said bondholders, never-
52 theless said Kann positively and deliberately refused to preserve the existing insurance or to effect new insurance for the benefit of your orator as such trustee or said bondholders, and intentionally allowed the said existing insurance to lapse and to be cancelled.

Counsel for responding defendants object to the offer because the said admission is an excerpt from the entire paragraph and is therefore improper, unless taken in connection with the whole of the averments of paragraph fourteenth; and further, that the answer is not to be construed as any admission of the averment of the fourteenth paragraph of the supplemental bill within the meaning and intent of the entire paragraph or of the particular cited sentence.

As a further admission, complainants offer the averment of the fifteenth paragraph of the supplemental bill in total.

To which counsel for responding defendants object that the answer does not admit the allegation of the fifteenth paragraph of the bill within the meaning thereof as recited in the said paragraph.

As a further admission of the allegations of the said supplemental bill contained in paragraph fifteenth the complainants specifically offer the averment in said paragraph, as follows: "And your orator further alleges that in answer to its said insistence concerning the insurance of its interest as trustee and of those of said bondholders, said defendants Kann and Penn Plate Glass Company, continued to maintain their attitude of refusal to effect such insurance in spite of the demands of your orator, and procured to be filed in this court a certain bond whereby said Kann and one Emanuel Wertheimer covenanted to pay to your orator as such trustee for the holders of said bonds in case of loss of a sum equal to the total amount of such of said bonds as might be valid out of the certain policies of insurance then existing in favor of the said Penn Plate Glass Com-
53 pany, being the policies of insurance hereinafter referred to, provided it should be finally adjudicated that the said Penn Plate Glass Company was bound or liable by anything contained in

said mortgage or the terms of its purchase of said mortgaged property, to keep and maintain insurance for the benefit of the holders of bonds secured by said mortgage.

To which counsel for responding defendants object that the allegations of the fifteenth paragraph cited are an excerpt from the entire paragraph; and for the further reason that the answers do not admit the said cited portion of the said fifteenth paragraph of the bill in the manner in which the same is stated in the said fifteenth paragraph of the bill; and for the further reason that the plaintiff's supplemental bill does not contain or purport to contain, a copy of the said alleged bill as an exhibit to the bill.

In connection with the last offer the complainants offer in evidence bond or stipulation executed by Emanuel Wertheimer and W. L. Kann to The Farmers' Loan & Trust Co., complainant, sworn to July 21, 1896, filed in the circuit court of the United States for the western district of Pennsylvania on July 24, 1896, at No. 6 November term, 1896, in the matter of the original bill of complaint filed in this case.

By Mr. SCHOYER: What is the purpose of the offer?

By Mr. FERGUSON: The purpose of the offer being, in connection with the averments of the fifteenth paragraph of the bill and the recitals of the mortgage, to show that in pursuance of a demand by the complainant for insurance, the defendant, The Penn Plate Glass Company, also the defendant Kann, caused and procured the paper now offered to be executed and delivered to The Farmers' Loan & Trust Co., complainant, and filed in court in pursuance of its demand.

Counsel for responding defendants object to the offer be-
54 cause the existence of the paper itself is not evidence of the circumstances nor of the occurrences which transpired in open court by reason of which the said bond was filed; and for further reason that the said offer is immaterial, irrelevant and ineffectual to advance the reliefs prayed for in the supplemental bill.

As a part of the record of the supplemental bill, counsel for complainants call attention to a certain petition filed by the Penn Plate Glass Company at No. 6 November term, 1896, on June 22, 1898, praying for the appointment of a receiver to collect and receive from the insurance companies named as defendant in supplemental bill the amount of insurance effected by the Penn Plate Glass Company in and by its policies of insurance, and to hold the same pending the final decision of the questions raised by the supplemental bill, and to the decree of the court on said petition, filed July 2, 1898, appointing Emanuel Wertheimer receiver for the purpose prayed for in the petition referred to, to be followed by evidence that the said Emanuel Wertheimer, appointed receiver by the said order of court, did collect and now has in his hands the sum of $150,000 to abide the result of said supplemental bill.

Complainant now offers in evidence the said petition of June 22, 1898, referred to in the preceding offer, and decree of July 2, 1898, referred to in the preceding offer, the allegation and stipulation of Emanuel Wertheimer, W. L. Kann, and the Farmers' Deposit Na-

tional Bank of the City of Pittsburg, and the certificate of Emanuel Wertheimer as to the ownership of $160,000 of the bonds, filed at No. 6 November term, 1896, and also the stipulation of Emanuel Wertheimer for the withdrawal of the $160,000 from participation in the insurance funds filed to the said number and term, all of said papers being filed on July 2, 1898. To be followed by evidence that the said Emanuel Wertheimer, receiver has in his hands $150,000 to be applied under the supplemental bill in this case according to the decree of the court, to the $90,000 of bonds secured by
55 the mortgage of the Pennsylvania Plate Glass Company hereinbefore referred to, being bonds other than the $160,000 claimed to be owned by the said Emanuel Wertheimer.

Counsel for responding defendants renew their objections to this offer, and further object that none of the papers referred to in the said offer are recited in the supplemental bill, or *for* any part thereof; and for the further reason that the said papers so offered form part of an interlocutory proceeding instituted before the judge of this court and acted upon by him after full argument and discussion and notice to the complainant, and forms *on* part of the issues raised by the pleadings in the supplemental bill.

*Testimony of Emanuel Wertheimer.*

EMANUEL WERTHEIMER, a witness called on behalf of the complainant, after being duly sworn, testified as follows:

Direct examination by Mr. FERGUSON:

Q. Mr. Wertheimer, on the 2nd of July, 1898, in the case of The Farmers' Loan & Trust Company against The Pennsylvania Plate Glass Company *et al.*, No. 6 November term, 1896, after the filing of the supplemental bill in that case in which a great number of insurance companies were joined as defendants, you recall the fact, do you not, that a petition was filed with reference to the insurance moneys and for the appointment of a receiver to collect the insurance moneys?

A. Yes, sir.

Q. And you were appointed that receiver?

A. Yes, sir.

Q. You gave bond and entered upon the duties of your appointment?

A. Yes, sir.

By Mr. SCHOYER: All this testimony is under the objection made to the offer.

Q. Since that, Mr. Wertheimer, will you tell us how much insurance money you have collected?

56 (Counsel for responding defendants object to this question because such inquiry is not within the issues created by the supplemental bill and the answer, and is immaterial and irrelevant, this witness not being bound to account to the plaintiff in this cause

at this time as to his procedure under his receivership, the same being a distinct interlocutory proceeding of this court.)

A. I have collected, perhaps, about three-fourths.
Q. In dollars and cents, how much did that amount to?
A. Something over $200,000.

As a further admission of matters alleged in the supplemental bill, complainant offers the averment contained in the eighteenth paragraph of said bill, to wit: "That a very great portion of the property covered by the mortgage was destroyed by fire, and that said fire occurred on or about the 12th day of April, 1898."

*Testimony of Philip Semmer.*

PHILIP SEMMER, a witness called on behalf of complainant, after being duly sworn, testified as follows:

By Mr. SCHOYER: What do you want to prove by this witness?
By Mr. FERGUSON: I want to prove the averments of the bill to the effect of Mr. Kann's connection with the Pennsylvania Plate Glass Company.
By Mr. SCHOYER: I object to that for the reason that Mr. Kann's connection with the Pennsylvania Plate Glass Company is a matter that can be proven by the records of the Pennsylvania Plate Glass Company.

Direct examination by Mr. FERGUSON:

Q. Mr. Semmer, where do you reside?
A. At Irwin, Pa.
Q. You may state whether or not you were at any time connected with the Pennsylvania Plate Glass Company.
A. I was.
Q. In what capacity?
A. My last connection was the president of the company.
57 Q. At about what date did you first become connected with the company?
A. I was connected with the company in different capacities all the way from sales agent up to president of the company.
Q Between what years?
A. During its entire existence.
Q. About what time did it come into existence?
A. About the year '90 or '91, or along there.
Q. Do you know W. L. Kann, one of the defendants in this case?
A. I do.
Q. When did you first become acquainted with him?
A. In the fall of 1893—the World's Fair fall.
Q. After that date, did Mr. Kann in any way become connected with the Pennsylvania Plate Glass Company?
A. The first of the year following he was elected a director and treasurer. That was in 1894, I think.
Q. Prior to being elected president or director of that company,

state, if you know, whether there were any negotiations between him and the company, or persons acting in its behalf, with reference to the way in which he was to become connected; what part he was to have in connection with that company?

(Objected to by counsel for responding defendants as irrelevant and incompetent and outside of the issues of this bill.)

A. There was an agreement entered into between some of the stockholders and Mr. Kann as to his (interrupted)——

Q. Was that agreement verbal, or in writing?

A. It was verbal.

Q. Who were the stockholders parties to the agreement to which you refer?

A. It was the controlling stockholders.

Q. Give the names of the parties, if you can.

A. They were represented by Mr. George Cowen and myself.

Q. You may state whether or not you personally took part
58 in the making of this verbal agreement, or arrangement with Mr. Kann, so that you can give us the terms of it?

A. I practically handled the entire negotiations.

Q. When and where was this agreement, or understanding, entered into with Mr. Kann?

A. It was shortly prior to his becoming connected with the company,—the last or latter part of 1893, and the negotiations were consummated in New York and here in Pittsburg and Irwin at different meetings.

Q. You may tell us what that agreement or understanding was?

(Objected to by counsel for responding defendants as irrelevant and incompetent and outside of the issues of this bill and an attempt to bring in outside issues.)

A. At that time—it was during the panic—Mr. Geo. Cowen, myself and others held the controlling interest of the company and were very hard pressed for money to carry on the successful operations of the plant and were looking about for somebody to provide additional money. Mr. Kann seemed to be disposed to (interrupted)——

(Objected to by counsel for responding defendants.)

A. (continued.) We finally entered into an agreement with Mr. Kann.

Q. What did you agree with Mr. Kann?

A. That we would give him one-third of the controlling stock provided he would furnish the company with whatever money was necessary to operate the same. At the time it was pointed out to him the company's immediate requirement, and it was fully showed to him that fully $100,000 would be required which he did agree to furnish on condition that Mr. Cowen and myself would assign to him, without cost, one-third of our joint holdings of the controlling interest, which we did, and which amounted to about $86,000 of the company's stock.

Q. And you say you did assign that amount to him?

A. We did; the company's books will show the record of the transfer.

59 Q. In pursuance of that agreement on the part of Mr. Kann as to the amount he was to advance in consideration of that assignment, state what he did.

A. Mr. Kann accepted the directorship and financial management, that is, the treasurership at the annual election.

Q. That was January, 1894?

A. Yes, sir; and he provided different sums of money amounting, all told, to $38,500, during the first six weeks of his connection with the company.

Q. First, I will ask you how early in January, 1894, this election of the company was held.

A. To the best of my recollection, it was January 10th, the annual election.

Q. And I will ask you again whether or not any portion of this $38,000 was advanced before Mr. Kann was elected.

A. No; there was not any portion of that advanced before he was elected.

Q. How did he advance that?

A. He advanced on the personal understanding between him and myself, that he was to endorse with me notes of the Pennsylvania Plate Glass Company whatever amount was needed, and the company was to give us, for our protection, judgment notes pending his being able to make financial arrangements to furnish this money, from the sale of preferred stock, or otherwise, which we understand he would do, and, in fact, he asked for and got an option on the unsold preferred stock of the company for that purpose which was voted to, that is, the option was voted to (interrupted)——

(Objected to by defendants' counsel.)

Q. Before you go on with that, how much preferred stock of the company remained unsold at that time?

(Objected to by defendants' counsel, as the books are the best evidence.)

A. About $106,000, to the best of my remembrance.

Q. The money being advanced, as you have testified, first upon notes of the company endorsed by yourself and by Mr. Kann,

60 when this preferred stock was acquired by Mr. Kann, what, if anything, according to the arrangement between you, was to be done with the notes?

A. Mr. Kann was to pay for this preferred stock and he would lift the company's notes with the proceeds of the sale of the stock. As to how he was going to sell the stock, or what he was going to do with it, we didn't know.

Q. You have spoken of judgment notes that were to be given. Whom were they to be given to?

A. They were to be given to Mr. Kann and myself for our endorsements of the company's notes.

Q. Were any judgment notes, or was any judgment note, given either to you or Mr. Kann together, or to either of you, for any portion of the $38,500?

A. There was a judgment note *af* $10,000 given to Mr. Kann.

Q. Why didn't he get the other $28,500?

A. Mr. Kann did not propose to carry out his contract, and it was refused to him for that reason. In other words, after advancing $38,500, he refused to advance additional moneys unless certain other conditions were complied with.

Q. What were they?

A. That Mr. Cowen and myself would assign him the balance of our stock.

Q. That is, in excess of the one-third?

A. Of the one-third.

Q. You mean, in excess of the one-third of the controlling stock you have spoken of?

A. Yes. In other words, unless we gave the balance of our stock, he would decline giving further judgment notes for that purpose.

Q. When did that happen,—when was it he made this demand for the remaining two-thirds of the controlling stock, or any portion of it?

A. Within three or four weeks after becoming identified with the company.

Q. By identified, do you mean, making this arrangement?

A. After January 10th.

Q. That was after he was elected treasurer?

A. Yes, sir.

Q. Did he ever resign the office of treasurer?

A. No, sir.

61 Q. After you refused to give him this additional stock, and he had refused to put up this additional money, what next took place?

A. He entered the $10,000 judgment note.

Q. Do you know whether that note was made payable to you and him together or only him?

A. It was made—all our paper was made payable to the treasurer under the laws of the company, and I should judge it was.

(Objected to by counsel for defendants.)

(A. continued.) The best of my remembrance is, the note was drawn to the treasurer's order and endorsed to Mr. Kann, and then his and my endorsement was also put on a judgment note. He held three sets of notes to cover one transaction practically—a demand note which he held personally, and time notes, which were discounted at the banks, and these judgment notes were a private, so to speak—private note for our own protection.

Q. Was there one judgment note of $10,000, or a number of notes aggregating that?

A. Only one. Mr. Kann advanced this money as required in sums ranging from $2,500 to $5,000 at different times, and the understanding was that he was to get judgment notes as fast as he

advanced the money, and this was the first one, I presume, that was given to him after having advanced $10,000 or $12,000, and he called on me for the balance of the judgment notes, which I declined to give him after making demand for the remainder of our stock.

Q. There was a receiver appointed for the Penn. Plate Glass Company. Had any portion of Mr. Kann's claim been put in judgment before the appointment of that receiver, if you know?

(Objected to by counsel for defendants for the reason that the records are the best evidence.)

A. Not that I know of, excepting this $10,000.

Q. And what was done on that $10,000? Execution issued, or not, if you know?

62 (Objected to by counsel for defendants for the same reasons.

A. The sheriff took possession on or about March 14th, I think.

Q. Who made application for the receivership?

A. The directors of the company made application and immediately called a stockholders' directors' meeting, and it was decided it was to the best interests of all creditors and the only thing that remained to be done was to have a receiver appointed. This application was made in the courts of Westmoreland.

Q. And that was immediately after the entry of the $10,000 judgment?

A. I think the following day.

Q. Had that any bearing upon the application?

A. It was the cause of the application, otherwise the company was in no immediate stress, excepting the pressure brought on by Mr. Kann.

Q. You have stated that Mr. Kann advanced $38,500. Do you know whether or not he was repaid that money by the company in any way?

A. I can't say exactly how much he has recovered of the money.

Q. Was he repaid that money, or any portion of it?

A. He certainly must have been.

Q. Do not answer unless you know. You cannot give hearsay.

A. I think he was paid. I know that he attached $15,000 or $16,000 of the company's money in New York.

Q. In whose hands?

A. Principally in the hands of Mr. Nathan Hutcoff.

Q. Who was Nathan Hutcoff?

A. He was a large stockholder and our selling agent in New York. Mr. Kann attached all the funds of the company here in bank.

Q. What bank?

A. People's national.

Q. How much money had the company in the hands of the People's national bank, if you know?

A. $3,000, somewhere along there. From the sale of the
63 personal property Mr. Kann must have received additional $5,000 or $6,000.

(Objected to by counsel for defendants for the reason that the records of the execution are the best evidence.)

Q. Mr. Semmer, state, if you know, whether, after the appointment of the receiver, any action was brought by Mr. Kann against the Pennsylvania Plate Glass Co. to recover the balance of the $28,500 which was not represented by the $10,000 judgment note to which you have referred.

A. Yes, there was action taken in the courts of Westmoreland, and now pending, I think, for the remaining moneys in the receiver's hands.

Q. Do you know whether judgment was reached in that case or cases?

A. I don't know that.

Q. Did you vacate the office of president in January, 1894? In other words, was Mr. Kann elected to take your place or not?

A. Oh, no; I still continued to be president of the Pennsylvania Plate Glass Co. Mr. Kann was treasurer of the company, not the president.

Q. Was he also a director?

A. He was.

Q. And you were president and director?

A. I was president and director.

Q. And I suppose there was no change?

A. There has been no change since that time.

Q. Has there been any other election?

A. No, sir.

Q. Mr. Semmer, you knew of the existence of the mortgage involved in this case, of course?

A. I did, yes, sir.

Q. As president of the company, you may state whether or not at any time any insurance prior to January, 1894, was taken out by the company for the benefit of the mortgage trustee of the bondholders?

A. There was.

Q. Do you know the amount of that insurance?

A. It varied at different times, but the intention was to keep (interrupted)——

(Objected to by defendants' counsel as immaterial.)

64 (A. continued)—to keep fully $250,000 insurance.

Q. How much did you generally have on the property?

A. We carried from $250,000 to $400,000 at different times.

Q. How much of that was for the benefit of this bond and mortgage?

A. We always reserved $250,000.

(Objected to by counsel for defendants unless the policies them-

selves are produced and the reservation shown, if it is at all material.)

Q. At the time that Mr. Stoner was appointed receiver, how much insurance, if you know, was outstanding for the benefit of this mortgage?

A. I can't positively state. My remembrance is that some of the insurance had lapsed or run out, but I think it was very close on to $250,000.

Q. Why was that insurance placed for the benefit of this mortgage?

(Objected to by counsel for defendants as indefinite.)

A. We had sold the bonds with that understanding that they were to be insured.

(Question withdrawn.)

Q. Do you know what has become of that insurance—whether it was kept alive or not?

A. I know little what the receiver has done since that time.

Q. Has the Pennsylvania Plate Glass Co. ever kept the insurance alive?

A. Not itself, unless the receiver kept it alive.

Cross-examination of Mr. Semmer suspended by consent of counsel until Wednesday morning, Sept. 14th, 1898, at 10 o'clock a. m.

65 *Testimony of Joseph W. Stoner.*

JOSEPH W. STONER, a witness called on behalf of complainant, after being duly sworn, testified as follows:

Direct examination by Mr. FERGUSON:

Q. Mr. Stoner, were you at any time connected with the Pennsylvania Plate Glass Co.?

A. I was.

Q. In what capacity?

A. I was a director, secretary and treasurer.

Q. And you subsequently became the receiver of the company in the proceedings in the court of common pleas of Westmoreland county?

A. I did.

Q. When did your connection with that company first begin?

A. During the summer of the year of 1893. I can't just give you the data. It was in the second year of its existence—'93, some time.

Q. You were subpœnaed as a witness to testify here, were you not?

A. I was.

Q. Have you with you the transfer book of the Pennsylvania Plate Glass Co.?

A. I believe we have it in Mr. Gamble's safe

Q. Mr. Stoner, I call your attention to Defendants' Exhibit No. 2, offered by defendants in the testimony taken under the original bill of this case, page 134 of that exhibit. You may state whether or not the certificates of stock referred to in the account of W. L. Kann—Wm. L. Kann—on that page, were issued to him, if you know?

(Objected to by defendants' counsel until it be shown that the witness was the officer through whom the certificates were issued and had any connection with that branch of the business.)

A. I only know it as a matter of record of the books. I personally, can't recall anything.

Q. I call your attention to the second entry on that page, Cowen, Semmer, and Frederick certificate No. 434, 822. The 822 stands for what—the number of shares?

66 (Objected to by counsel for defendant- until it be shown in whose handwriting this is—whether it is in the witness' handwriting, or whether he knows anything about it, except what the face of the paper shows.)

(No reply.)

Q. Who was George Cowen?

A. He was one of the directors of the Pennsylvania Plate Glass Company.

Q. And who was Semmer?

A. He was president.

Q. And Frederick?

A. Well now, I'll rest. I don't know.

Q. What was your position in December, 1893, and February, 1894?

A. I was treasurer in December, 1893—director and treasurer.

Q. At that time did you meet Wm. L. Kann?

A. I believe I did.

Q. Where did you meet him?

A. At the factory, and in the capacity that he was frequently assembled as a director at stockholders' meetings.

Q. Before that did you meet him?

A. I don't know that I did.

Q. Did you have any talk with him in relation to the terms upon which he was to become connected with the company?

A. No, sir.

Q. You don't know anything about that?

A. No, sir, I wasn't consulted.

Q. Did you know anything about the insurance that was held on the company's property?

A. I did.

Q. Did you know of the existence of the mortgage to the Farmers' Loan & Trust Co. for $250,000?

A. Yes, sir.

Q. You may state whether or not you know there was any insur-

ance procured by the Pennsylvania Plate Glass Co. for the protection of that mortgage?

A. There was.

Q. When you became receiver of the company, I suppose you looked into the affairs of the company, did you not, at that time?

67 You may state, if you know, how much insurance was outstanding on the property of the Pennsylvania Plate Glass Co. for the protection of the mortgage involved in this case?

A. From memory, I would say, about $200,000.

Q. How long had that insurance to run, if you know?

A. Well now, it ran three, six and nine months. Some of it ran longer.

Q. Do you mean by that, three, six and nine months beyond the time at which you became receiver?

A. Yes.

Q. After you became receiver—first (the record, of course, will show) but can you tell us now, in this connection, from memory, the date at which you were appointed receiver?

A. The 19th of March, 1894.

Q. And in the deed to Kann, you sold the property to Kann as receiver?

A. Yes, sir, at a public sale.

Q. And that appears by the testimony all around here to have been about the 2nd of July, 1894. Is that your recollection?

A. The sale occurred a little earlier than that. It was some time in June.

Q. That was the date of the deed?

A. That was the date of the deed. There was an intervening period for objections, or something of that kind. Ten days earlier, or something like that,—a period in which anybody could object to the confirmation.

Q. During the time when you were receiver, did you take out any insurance for the benefit of this mortgage?

A. I did.

Q. How much?

A. I can't tell from memory. The court instructed me to take out a line of insurance and I was only there as a representative of the court and followed the instructions of the court, and was short of money, and was granted permission to issue some receiver's certificates for that purpose.

Q. For how much?

A. Some four or five thousand dollars.

Q. Have you got with you, Mr. Stoner, the minute book of this company?

A. It is in Mr. Schoyer's office, I think.

68 Counsel for responding defendants waive further proof of the authenticity of any of the books of the Pennsylvania Plate Glass Co. heretofore offered in evidence under the original bill and marked as exhibits by the commissioner, H. D. Gamble.

Hearing here adjourned until 2 o'clock p. m. same day and met pursuant to adjournment.

*Afternoon Session.*

JOSEPH W. STONER recalled.

Direct examination continued by Mr. FERGUSON:

Q. As an officer of the Pennsylvania Plate Glass Co., I wish you would state whether or not you know of any agreement by which Mr. Kann was to advance any money to the Pennsylvania Plate Glass Co.?

(Objected to by counsel for responding defendants as immaterial and irrelevant.)

A. I do not know of anything of that kind.

Q. Whether you know of any such agreement or not, did you know of any advancement of money on the part of Mr. Kann to the Pennsylvania Plate Glass Co.?

A. I did, after his election as a director and as treasurer of the company.

Q. And how much money did you learn in any way that he advanced?

A. In round numbers, about thirty-six to thirty-eight thousand dollars. I think it is thirty-eight thousand and some odd hundred, but I can't just tell.

Q. Did you learn whether or not Mr. Kann had been repaid any of that money in any way?

(Counsel for responding defendants object to the use of the word "repaid" as ambiguous and tending to mislead the witness.)

A. Yes, sir; he had at least recovered in part.

Q. How much did he recover, if you know?

69 A. I don't know that. I can't give you anything approximately close.

(Objected to by counsel for responding defendants, as the records will show.)

Q. Did you, as receiver, or as an officer of the company, know of any attachment against a man named Nathan Hutcoff in New York?

A. Yes, sir; I did.

Q. Did Mr. Kann attach any money in the hands of that party?

A. He did.

Q. Do you know now how much, of your own knowledge, he got by virtue of this attachment?

A. I know the amount of the attachment approximately, but what was realized I couldn't answer.

Q. Do you know whether he got the money?

A. He got whatever was paid on the claim.

Q. How much?

A. I don't know exactly.

Q. How much money did Hutcoff owe the Pennsylvania Plate Glass Company?

A. About $19,000.

Q. Did you ever, as receiver, get any money in excess of what Mr. Kann attached?

(Objected to by counsel for responding defendants as irrelevant.)

A. I got nothing.

Q. In your position as receiver, were you interfered with in getting the money by reason of any allegation that it had been attached and paid over?

(Objected to by counsel for responding defendants as leading and irrelevant.)

A. Yes.

Q. Why?

A. Because there was a prior attachment in ahead of me.

Q. Do you know whether Hutcoff paid the attachment or not?

A. He did pay the attachment.

Q. How much was it?

A. The book account was, in round numbers, about $19,000, but I have to—I don't know how much.

70 Q. You told me, didn't you, that Kann got that money?

A. He got that money.

Q. The People's National Bank of Pittsburg was depository or bank of the Pennsylvania Plate Glass Company, wasn't it?

A. Yes, sir.

Q. How much money was there on deposit?

(Objected to by counsel for responding defendants as irrelevant and incompetent.)

A. About $3,500.

Q. Who got the money?

A. Mr. Kann.

Q. When you were receiver, you, of course, were confronted with the execution, or judgment, of $10,000, weren't you, in anticipation of the receivership?

A. Yes, sir.

Q. In whose favor was that judgment?

(Objected to by counsel for responding defendants for the reason that the record is the best evidence.)

A. Mr. Kann.

Q. Was that judgment paid?

A. It was allowed under the distribution of the officer. It was paid.

Q. Mr. Kann got $10,000 on the judgment in anticipation of the receivership; he got fifteen or sixteen thousand dollars from Hutcoff; and he got $3,500 from the People's national bank, didn't he?

A. Approximately, yes.

Q. In other words, he got about $30,000?

A. Well, I shouldn't make it quite so high as that. It is a matter of record.

Q. About that amount, wasn't it?
A. Yes.
Q. You knew, didn't you that the entire amount that Mr. Kann had advanced the Pennsylvania Plate Glass Co., was $38,500?
A. Yes, sir.
Q. In the way that I have indicated, he has been paid to that extent?
A. Yes, sir; in round numbers.
Q. You were occupying what position when this company passed into the hands of the receiver?
A. I was one of the directors and secretary.
71 Q. Did you know anything about an agreement on the part of Mr. Kann that he was to advance $100,000?
A. No, sir.
Q. You knew nothing about that?
A. No, sir.
Q. When you became receiver, you have already testified that there were policies of insurance for the benefit of this mortgage to the amount of about $200,000. Is that correct?
A. Approximately yes.
Q. As I understand you, you said these policies had three, six and nine months to run after the date of your appointment?
A. Yes, sir.
Q. And I also understand you to say that in response to a demand from the trust Co., or its bondholders, that you got authority from the court to issue receiver's certificates to the amount of three or four or five thousand dollars to take out insurance for their benefit. Is that right?
A. Well, by instructions of the court, I was instructed to take out the policies of insurance as a protection on the property. I don't know that it was for the bondholders, particularly.
Q. It doesn't make any difference. You recall that you got authority to issue receiver's certificates?
A. Yes, sir.
Q. And those receiver's certificates were used in taking out insurance on this property?
A. Yes, sir.
Q. And that insurance was outstanding at the date you made the sale under the order of that court?
A. Yes, sir; the bulk of it was.
Q. And they were outstanding when Mr. Kann bought at your receiver's sale?
A. I think so, yes, sir.
Q. What did you do with those insurance policies?
A. I just let them stand.
Q. Did you ever assign them to anybody?
A. No, sir.
Q. Did you ever renew them?
A. No, sir.
Q. How long did you take them out for after you got the authority from the court to issue the receiver's certificates?

72 A. Some of them would run six months and some of them were a little shorter and longer, as I could get them taken.

Q. Can you tell who the insurance companies were that held insurance when you were appointed receiver?

A. I could not remember.

Q. Have you no record of it in any way?

A. I think there are some insurance books that might be resurrected.

Q. Why can't you tell me? You, of course, necessarily looked into the matter, didn't you?

A. I did, but I have no record here.

Q. Did you ever file an account as receiver?

A. Yes, sir.

Q. Can you tell me the insurance companies in which you took insurance under these receiver's certificates?

A. No, sir; I could not remember them. They were very hard to get. I had to place some of them abroad, and took them in a number of other localities.

Q. In the filing of your account as receiver, and in claiming credit for these receiver's certificates, is there anything that would show where you took the insurance?

A. The book will show what companies, I think.

Q. I am speaking about your account.

A. Not that I know of.

Q. Can you independently, of your own account, tell me the names of the companies in which you took that insurance?

A. No, sir; I couldn't remember. I could guess at a couple of them, but that is all.

Q. You can't give me any information?

A. No, sir.

Q. Now, then, when you sold this property, of course you have already stated that you knew of the existence of this mortgage?

A. Yes, sir.

Q. When you took out this insurance, can you tell from recollection, anything about the terms of the policies of insurance?

A. They were all made out on a form of the system that had been adopted.

Q. To whom was this loss made payable?

A. First, if any, to the bondholders.

73 Q. The bondholders, or the Farmers' Loan & Trust Co.?

A. For the Farmers' Loan & Trust Co. for the benefit of the bondholders.

Q. According to your recollection, do you not know whether or not these policies of insurance were made payable to the Farmers' Loan & Trust Co. as trustee?

A. I cannot say now.

Q. You are sure they were made for the benefit of the bonds secured by the mortgage?

A. Yes.

Q. And it was a general policy of insurance for that purpose?

A. It was.

Q. And those policies were taken out in the name of the Pennsylvania Plate Glass Co., were they?
A. They were.
Q. That is, for that company as the owner of the property?
A. That was it; yes, sir.
Q. For the benefit either of the trust Co. or the bondholders, and you are not certain which?
A. No, sir.
Q. Is that true of the policies that you found in existence before you became receiver as well as those that you took out yourself?
A. Yes, sir.

By Mr. SCHOYER:

Q. Where are those policies?
A. I ain't sure where they are. They expired, and I don't know where they are. We had a book in which we kept a record of the majority of them.

By Mr. FERGUSON: I call for the production of the policies themselves.

Q. Where is that book?
A. I presume it is stored amongst the multitude of books that I have.
Q. You were subpœnaed to produce all books and papers?
A. I have them in my care and can produce them.
Q. Where are they?
A. They are stored down here in a vault.
Q. Where?
A. In Mr. Kann's office.
Q. And the Mr. Kann that you refer to is one of the defendants in this case?
A. Yes, sir.
74 Q. And the policies are in his possession?
A. I don't know that they are. I claim rights and privileges in those books and papers myself.
Q. I want to know where those papers are?
A. I think they are stored with a multitude of books. There is a box down there that would weigh 500 pounds, or maybe more.
Q. Well, they are stored in Mr. Kann's possession, aren't they?
A. They are stored in that place and condition.
Q. Is that true as to the policies that were outstanding before you became receiver?
A. I don't know. I think they are all in the same shape.
Q. And the policies that you took out as receiver are there also?
A. I think so. I couldn't positively say so. I would have to look.
Q. But that is your present belief?
A. Yes, sir.
Q. Now, then, as I understand, Mr. Stoner, as receiver under the order of the court of common pleas of Westmoreland county, you put this property up knowing there was a $250,000 mortgage against

it, and you sold it by virtue of the order of that court subject to that mortgage, didn't you?

(Objected to by counsel for responding defendants for the reason that the record is the best evidence of what he did and what the court ordered.)

A. Subject to a lien of that mortgage.

Q. What did you do with these policies of insurance after you sold the property?

A. Allowed them to remain and to go on regularly.

Q. Did you make any assignment of them to any one?

A. No, sir.

Q. Did you notify Mr. Kann of the outstanding of these policies?

A. I did.

Q. And they were allowed to remain until they expired by their own terms?

A. That is the situation.

75 Q. Did you ever take any policies out?

A. No, sir; not after the sale or not after the confirmation really.

Q. At the time of that sale, did you know that Mr. Kann proposed to reorganize the company?

A. I did not.

Q. How soon afterwards did you know that he proposed to reorganize the company?

(Objected to by counsel for responding defendants as irrelevant and incompetent.)

A. I don't know.

Q. How soon, about, as nearly as you can fix it?

A. It might have been six months.

Q. It might have been a great deal less, mightn't it?

A. Perhaps. I could guess at it. I wouldn't like to say.

Q. Give us your best judgment.

A. About six months.

Q. Would you say that was the earliest time that you knew of it?

A. No; I hardly know how to answer that.

Q. What was the earliest time that you knew?

A. Well, say, December.

Q. That is December, 1894, is it?

A. Yes, sir; some time in the month of December, 1894.

Q. You sold in June or July, 1894?

A. Yes, sir.

Q. And that is the earliest you knew of it?

A. That is the earliest I recollect of now.

Q. You were a stockholder when you were appointed receiver, weren't you?

A. I was.

By Mr. SCHOYER:

Q. A stockholder of what?

A. Of the Pennsylvania Plate Glass Company.

By Mr. FERGUSON:

Q. And a director at the same time?
A. Yes, sir.
Q. And you are a stockholder of the Penn Plate Glass Co. today, aren't you?
A. No, sir.
Q. Were you ever?
A. I was.
Q. When did you first become a stockholder of the Penn Plate Glass Co.?
A. I think it was in 1895.
76 Q. How early in 1895?
A. When its charter was taken out.
Q. You became a stockholder immediately, didn't you?
A. I am a charter member.
Q. You sold as receiver in June or July, 1894?
A. Yes, sir.
Q. And Kann held the property without a corporation until January, 1895, didn't he?
A. July, 1895, I think.
Q. And as quick as the company was organized you were a stockholder?
A. Yes, sir.
Q. And it was understood you were to be a stockholder before it was organized, wasn't it?
A. No, sir.
Q. How did you come to be a stockholder?
A. By solicitation of the other members.
Q. Who were the other members that solicited you?
A. The charter members.
Q. Who were they?
A. Mr. Dryfus, Rosenthal, Kerr, I believe, and Mr. Wertheimer and Kann.
Q. When you did become a member, how many shares did you take?
A. Ten.
Q. Par value how much?
A. One hundred dollars.
Q. How much did you pay for it?
A. I paid $100 a share.
Q. What was the capital, if you know?

(Objected to by counsel for responding defendants as immaterial and for the reason that the record will show.)

A. I think it was $200,000.
Q. Mr. Stoner, before you were receiver, you knew, didn't you, that the Farmers' Loan & Trust Co. was insisting on this insurance being kept up?
A. Yes, sir.

Q. And you were keeping it up as a corporation?
A. As the receiver for the old corporation.
Q. Before you were receiver?
A. No; we didn't keep it up as a new corporation.
Q. Before you were receiver?
A. Oh, yes; we were keeping it up before as a company.
77 Q. The question is this: Before you were appointed receiver, and while the Pennsylvania Plate Glass Co. was in active existence, you knew, didn't you, that the Trust Co. was insisting that this insurance should be kept up?
A. Yes, sir.
Q. And you were keeping it up?
A. We were keeping it up as best we could.
Q. And you knew, didn't you, after you became receiver, they were insisting upon it?
A. Yes, sir.
Q. And it was because they were insisting upon it that you went into court and got the order to issue the receiver's certificates?
A. Yes, sir.
Q. And you did keep it up as receiver?
A. Yes, sir.
Q. And then, of course, when you sold the property you thought you were done with it, didn't you?
A. I stopped paying any more money, but allowed the policies to run out in the regular term.
Q. And that is all you had to do with it?
A. That seemed to be all the court instructed me to do.
Q. I want to know—I don't know what the fact is, but I am trying to find out. I have got some information (I don't mean officially) that indicates to me, and that is why I am asking about it, that when you sold this property you turned these policies over to Mr. Kann. Is that true or not?
A. No, sir.
Q. You didn't do anything of that kind?
A. I did not.
Q. Then you made no formal transfer?
A. No, sir.
Q. And you simply allowed whatever polices the company had taken out, or you had taken out as receiver, to lapse? Is that the fact?
A. Yes, sir; that is my recollection now.
Q. But whatever policies you had, whether they had lapsed or not, you delivered over as a matter of fact to Mr. Kann when he became the purchaser at the receiver's sale?
A. No, sir.
78 Q. What did you do with them?
A. I had them stored in the proper safes in the factory.
Q. When did you turn them over to Mr. Kann?
A. I didn't turn them over at all.
Q. I don't mean by assignment, I mean actual delivery?
A. It became necessary to remove and take the books out of the

factory when the new operations were instituted by the new corporation, and I boxed them carefully and shipped them in here and stored them.

Q. When did you do that?

A. After the new corporation took place.

Q. When was that?

A. July, 1895.

Q. How soon after July, 1895, did you do that?

A. Some time that fall.

Q. It was after July, 1895, and before the close of the year?

A. Yes; that is the way it appears to me.

Q. Have you ever filed a final account as receiver?

A. No, sir.

Q. Never been discharged?

A. No, sir. I have filed three supplementary accounts, but not a final closing. I am still under bond as receiver.

Q. Can you produce those policies of insurance?

A. I wouldn't like to say.

Q. Have you relinquished control over them in favor of Mr. Kann?

A. No, sir.

Q. Do you know Mr. Kann?

A. Yes, sir.

Q. Is he here at this hearing?

A. Yes, sir, he is present.

Counsel for complainant here demand that Mr. Kann produce all these policies of insurance, and that the witness, Stoner, also produce them.

Counsel for responding defendants state that Mr. Kann has no control, or custody of those papers, or ownership or possession of them. The box- in which all the papers were contained were simply stored there for the benefit of the receiver, Mr. Stoner, the witness, and he can get anything he wants at any time.

79 Cross-examination by Mr. SCHOYER:

Q. Mr. Stoner, as secretary of the Pennslyvania Plate Glass Co., or as an officer of that company, had you anything to do with keeping the stock ledger or the issuing of stock certificates?

A. No, sir; not direct.

Q. Did you have any?

A. No, sir.

Q. Who did have?

A. Mr. George Cowen was the custodian of the seal and the stock books, and he had a young man by the name of Mr. Zell, who was clerk,

Q. Where were the stock certificate books kept?

A. They were kept in New York during most of their existence.

Q. When you speak about Mr. Kann being paid the amount of is advancements to the Pennsylvania Plate Glass Co., do you mean

that he received certain moneys on executions issued on the judgments and attachments for that debt?

A. Yes, sir.

Q. It was an adversary proceeding, was it?

A. It was.

Q. And no payment by the Pennsylvania Glass Co.?

A. No, sir.

Q. That is to say, he entered upon the judgment and othe proceedings, and in order to collect them, issued executions on the personal property at Irwin, and attachments in New York city?

A. Yes, sir.

Q. That is what you mean by his being paid?

A. Yes, sir.

Q. Whatever money he got, either through the sheriff of Westmoreland Co. or by attachment in New York, on executionary processes issued on his judgment as a plaintiff against the Pennsylvania Plate Glass Co., was it not?

A. Yes, sir.

Q. And wherever you used the word "paid" you use it in that sense?

A. Use it adversely to the company.

Q. Don't you know, Mr. Stoner, that all the money that was derived from the sale of the personal property by the sheriff on Mr. Kann's judgment was used for paying wages, or prior lines, or nearly all?

80 A. The money made out of the sheriff's sale at Irwin was applied to the labor claims by priority, or preference.

Q. Didn't that absorb nearly all the proceeds of that sheriff's sale?

A. Yes, sir. The most of that.

Q. And it didn't pay them all?

A. It didn't reach the labor claims.

Q. Was there anything coming out of that sale back to Kann?

A. Not out of the sheriff's sale.

Q. Now, the money that you received from Mr. Kann's bid when the court ordered you to sell, or the amount of that bid, was $38,500?

A. $37,500.

Q. Was any portion of that money applied to labor claims and other judgments?

A. I think there were some of it applied to labor, and I believe out of that money the receiver's certificates were cancelled.

Q. And weren't there other judgments and liens which were also paid?

A. I don't remember now. There was an auditor to distribute it, and I think it came in in that method.

Q. Don't you know, Mr. Stoner, that out of all the money that was received, all that Mr. Kann got was $7,500, allowed by the auditor?

A. Well, it is a matter of record. I ain't sure, but that is about it. I don't remember just the amount.

Q. You spoke about an attachment issued against Nathan Hutkoff of New York?

A. Yes, sir.

Q. And who was Nathan Hutkoff? Wasn't he a director of the company?

A. He was a stockholder of the company.

Q. Do you know, sir, what goods were levied upon on that attachment?

A. There were six or eight car-loads of glass that were shipped to New York to Mr. Hutkoff by an order of the court by me.

Q. But I am speaking about who owned it?

A. The Pennsylvania Plate Glass Company, they were the owners.

81 Q. And do you know the transaction by which Mr. Hutkoff got possession of this glass?

A. He bought it and by an order of the board of directors it was shipped in ten days and the court confirmed that order, and I obeyed the instructions.

Q. What was the attachment on in New York?

A. On the proceeds of that sale.

Q. That was a lump sale, was it not, of all the glass that was there?

A. It was of all the finished glass in the factory.

Q. And that was by order of the board of directors, was it?

A. By order of the board of directors the sale was made, and by order of the court I was instructed to consummate the sale and finish the shipments.

Q. You were a member of the board of directors at that time, were you not?

A. I was.

Q. Do you know of any of the circumstances that lead up to that sale?

(Objected to by counsel for complainant as not cross-examination and as irrelevant.)

A. There was a peculiar combination of circumstances at which I was present in which Hutkoff agreed to clean up all the glass we had in the house in a lump sale at so much and for such an amount of money, cash down, and the balance on extended credit.

Q. Hutkoff was a creditor of the company at that time, wasn't he?

A. Perhaps a small one. I don't know just how much.

Q. Wasn't he an endorser upon the paper of the company to a considerable amount?

A. He was, yes, sir.

Q. Don't you know, sir, that the sale was made for the purpose of putting it into Hutkoff's possession in order that he might protect himself?

A. Not officially, I don't.

Q. Do you know that?

A. I do know that it was done for that purpose.

Q. Don't you know that you objected to that sale being made?

A. I did.

82 Q. As a director of the company?

A. As a director of the company, I am on record as objecting.

Q. And who was it advocated the sale?

—. Mr. George Cowen and Mr. Philip Semmer.

Q. Who were the board of directors at that time, do you recall?

A. George Cowen, Philip Semmer, R. H. Casey and Mr. Beamer, I believe, and Mr. Woods, of New York city.

Q. And yourself?

A. I ain't sure about Woods.

Q. Who was present at that meeting when the sale was agreed upon?

Witness now refers to minute book Defendants' Exhibit No. 1 in original bill.

A. You asked me who was present at that particular meeting. On the minutes of March 14, 1894, page 159 of Defendants' Exhibit 1—Philip Semmer, W. L. Kann, George Cowen, R. H. Casey and J. W. Stoner.

Q. Who kept the minutes?

A. Your humble servant.

Q. That is, you kept them?

A. Yes. You refer to that particular sale. If it is proper, I will read the motion as recorded as to that sale.

Q. Just read the minute.

(Objected to by counsel for complainant as not cross-examination.)

A. "On motion of Mr. Kann, the contract for all the glass on the floor of the factory sold to Nathan Hutkoff be accepted, and said contract for same be signed by our president, Mr. Semmer, and Mr. Hutkoff, the glass to be shipped in ten days from date. Seconded by Mr. Stoner and carried."

Q. It don't show the vote.

A. No.

Q. Mr. Stoner, do you recall the reasons stated at that time for making this sale?

(Objected to by counsel for complainant as not cross-examination and as irrelevant and incompetent.)

83 A. Well, the sum and substance of it was to protect those New York endorsers on a lot of paper in which they were a little more than ordinarily interested in and by shipping the glass to New York they proposed to cover their own security, or protection, or endorsers.

Q. Whom do you mean by the New York people?

A. Mr. Cowen, Mr. Hutkoff and Mr. Casey. They were two of the directors and one of the stockholders and were heavy endorsers.

Q. At that time, sir, what was the condition of the company as known to the board?

(Objected to by counsel for complainant as not cross-examination and as incompetent and irrelevant.)

A. The next resolution of the meeting that day will settle it, if you want to read it.

(Objection renewed by counsel for complainant.)

A. "On motion of Mr. Casey, that the factory be closed down for an indefinite time, or at the discretion of the executive committee, except to finish up the unfinished glass, or products on hand." This is dated March 14th, 1894, page 159, Defendants' Exhibit No. 1.

Q. That is the same meeting which authorized the sale to Hutkoff?

A. Yes, sir.

Q. Have you any knowledge of what transpired at that meeting; is it a correct notation?

A. It is.

Q. What was the condition of the company at that time—solvent or insolvent?

(Counsel for complainant object to the question as incompetent, irrelevant and not cross-examination.)

A. It was insolvent.

Q. Had, or had not, Mr. Kann at that time made demands for his money, or instituted proceedings for its recovery?

A. He had.

Q. Was that spoken of at the meeting?

A. It was.

Q. And what was said about that? What effect had that upon the making of this contract?

84 A. I don't just know as I remember exactly the words it brought forth that lead up to this contract as a preliminary step towards going into dissolution, or into the hands of a receiver.

Q. What were the terms of payment of this contract?

A. It was to be paid in 30 days, and then there was a note. I believe there was a note given for 60 days for $5,000, and the balance was to be paid part of it on the delivery. I don't remember the exact conditions of the payment. Part of it on delivery, and part of it was in the shape of a note.

Q. Was it a usual or unusual thing to make such a contract in the transaction of the Pennsylvania Plate Glass Company's business?

(Objected to by counsel for complainant as irrelevant and incompetent and not cross-examination.)

A. It was a very unusual transaction.

Q. But Kann got the attachment in ahead of Hutkoff and got his money?

A. It seems so, yes.

Q. Did this sale cover all the available assets of the Pennsylvania Plate Glass Co. at that time? Had you any other quick assets?

A. No, there were no quick assets. There was a lot of material and unfinished glass and wagons and horses, etc.

Q. Did this sale take up all the marketable stock of goods?

A. It did.

Q. And how about the prices—low or high or fair?

A. They were very low.

Q. Less than the market rates?

A. Yes, it was lower than the ordinary rates.

Q. Mr. Hutkoff was there at the time of this transaction?

A. He was present and examined the goods.

Q. How did this meeting come to be held? What was the object in calling the meeting at that time?

(Objected to by counsel for complainant as irrelevant, incompetent and not cross-examination.)

A. It grew out of the fact that Mr. Kann had entered some of his judgments and an execution was out in the sheriff's hands.
85 It was a specially called meeting of the president, to take such steps as were necessary to preserve the company and do what might be best.

Q. As secretary of the company, you knew Mr. Kann had given to the company the amount of money which he claimed?

A. I did.

Q. And that it was applied for the purpose of the company?

A. Yes, sir.

Q. Used in the regular line of business?

A. Yes, sir.

Q. To purchase materials, etc.?

A. Yes, sir.

Q. You knew, too, that he was entitled to have judgment notes for his advances by resolution of the board?

(Objected to by counsel for complainant as irrelevant, incompetent, and not cross-examination.)

A. There was a resolution of that kind in the minutes somewhere. I don't know the wording of it.

Q. But you knew the fact?

A. Yes.

Q. You signed the $10,000 judgment note as secretary, did you not?

A. Yes, sir.

Q. And that was signed by Mr. Philip Semmer?

A. Yes, sir.

Q. The one that was entered up?

A. Yes, sir.

Q. Then there was another judgment note signed by you, but not by Mr. Semmer given to Mr. Kann?

A. Yes, sir.

Q. You heard Mr. Semmer's statement that the judgment notes

were to be made to the joint order of Semmer and Kann. Was there anything of that kind?

A. Not to my recollection.

By Mr. FERGUSON:

Q. Do you mean to say that is not so, or that you don't know?

A. I don't know. There is a resolution which might cover that. Yes, there was; there was an order by the board of directors.

86 By Mr. SCHOYER:

Q. Is there anything that indicated a resolution, or an authorization that the judgment notes should be given to Semmer and Kann within your knowledge?

(Objected to by counsel for complainant as irrelevant, incompetent, and not cross-examination.)

A. No, sir; there is not.

Q. The action that you refer to appears, does it not, on page 156 of Defendants' Exhibit No. 1, dated Feb. 14th, 1894?

A. Yes, sir.

Q. Have you got the minutes of the executive committee?

A. I don't know where they are.

Q. You were examined at some length about insurances and about the custody of the books and papers of the Pennsylvania Plate Glass Co. Is it not true, sir, that you are in possession of all those books and papers, which you have stored in Mr. Kann's warehouse?

A. I am.

Q. And Mr. Kann has no control over them?

A. None whatever.

Q. And the occasion, as I understand it from your testimony, for removing them from the office of the Pennsylvania Plate Glass Co. at Irwin was that the new corporation, after it became organized, needed the room in their safe and vaults?

A. And it became necessary for me to make other arrangements.

Q. You are clear that you never transferred or gave to Mr. Kann as existing valid policies those policies which you took out as receiver?

A. No, sir.

Q. You simply permitted them to lapse?

A. I permitted them to expire by the regular course.

Q. You have always had these books in your custody ever since you put them there?

A. Yes, sir.

Q. You sold this property at public sale by direction of the court of common pleas at Westmoreland county?

A. I did.

Q. Under the order of that court?

A. Yes, sir.

87 Q. Was that order promulgated and announced at the time you made the sale?

A. It was advertised and due notice given of the sale and in the

regular way and at the day of sale the notices were read. The sale was adjourned.

Q. The sale was adjourned?

A. At the request of creditors, for ten days at one time.

Q. At whose request?

A. A number of the larger creditors. By order of the court it was continued.

Q. You were appointed on the bill of whom?

A. By request of the majority of the heaviest stockholders.

Q. Who filed the bill? Who was the plaintiff?

A. George Cowen, Philip Semmer, A. C. Boyd, Nathan Hutkoff, R. H. Casey, and several of the larger creditors joined into it. I don't now just remember who were amongst the number. The bondholders were represented.

Q. Did Mr. Kann have anything to do with the appointment of a receiver?

A. No, sir. The bondholders were represented by Hays & Noble, attorneys.

By Mr. FERGUSON:

Q. For whom, if you know?

A. I don't know, really.

By Mr. SCHOYER:

Q. Who represented The Pennsylvania Plate Glass Co., the defendant in that bill—what attorneys?

A. Moorhead & Head were the attorneys in charge, and prepared the papers which were put into the hands of the receiver. They were the regularly employed attorneys by the company.

Q. Did you, or the creditors, make any effort to reorganize, or pay off the debts, so as to avoid the sale?

(Objected to by counsel for complainant as irrelevant and not competent and not cross-examination.)

A. Yes, sir; I made three or four very earnest efforts to save the property.

Q. Did you have an interview with Mr. Kann on that subject?

A. I did.

Q. What did he say to you?

88 (Objected to by counsel for complainant as incompetent, irrelevant, and not cross-examination.)

A. He said that he simply wanted his own money, with security and interest, and we could have the use of it—the stockholders or creditors—for a number of years. I called the creditors' meeting.

Q. That was after he bought the property?

A. No, sir; before. I called the creditors' meeting, and we discussed the propriety of doing something in the shape of relinquishing the debt by taking up the preferred stock and distributing it among the creditors. I called the stockholders' meeting, laid the real facts before them of the standing as I found the property, and

asked them to *pro rata* the debt among them and put on an assessment to take care of our property, and there was a failure to respond.

Q. Mr. Kann then said all he wanted was his money with interest, and he would let it run for some years?

A. Yes, sir; he offered to extend it for some years if it was taken care of, and on the strength of that, the creditors, or stockholders, were called.

Q. What was the result?

A. There wasn't anything that seemed to materialize to relieve us.

Q. Do you recall who were present at the stockholders' meeting? Was Mr. Beamer there?

A. I couldn't tell you.

(Question withdrawn.)

Redirect examination by Mr. FERGUSON:

Q. You became a stockholder in the Penn Plate Glass Co.?

A. I am.

Q. How many shares of stock did you subscribe for?

A. I subscribed to ten shares of stock.

Q. Paid $1,000 for it?

A. Yes, sir.

Q. How much did you get out when you sold it?

(Objected to by counsel for respondent defendants.)

A. I refuse to answer.

Q. Did you get more than $1,000?

Q. I refuse to answer.

89 Q. How much more than $1,000 did you get?

By Mr. SCHOYER: All this is objected to because the witness has come here as the complainant's own witness, and because the question is entirely irrelevant.

Q. How much more than $1,000 did you get when you sold out?

A. I decline to answer.

Q. Did you get more than $1,000?

A. I refuse to answer.

Q Did you get more than $1,000?

A. I refuse to answer.

Q. Did you get $5,000?

A. I still refuse.

Q. Did you get $10,000?

A. I refuse to answer.

Q. You decline to answer as to whether you got more than $1,000 or not?

A. I do.

*Testimony of W. L. Kann.*

W. L. KANN, one of the defendants in this cause, called on behalf of complainant for cross-examination, after being duly sworn, testified as follows:

Counsel for responding defendants object to Mr. Kann's being called as for cross-examination. He is a party defendant and this is a proceeding in equity.

Direct examination by Mr. FERGUSON:

—. Mr. Kann, what I want to ask you about is this: In this supplemental bill there is an averment that after you became the owner of this property by virtue of the receiver's sale you paid interest on the coupons. Now, can you tell me what interest you paid?

A. I don't remember.

Q. Why can't you tell me?

A. Because I don't charge my memory with any transactions of that kind. I keep books for that purpose.

Q. Are you able to put yourself in the position to answer the question within a reasonable time, say, between now and tomorrow morning?

A. Yes, I guess I could.

90 Q. I don't want to ask you anything that you can't fairly answer, but when you bought this property, of course there was interest due on the coupons as secured by this mortgage, wasn't there?

A. I don't remember as to that, Mr. Ferguson.

Q. You can't tell anything about how much interest you paid?

A. Not now, no.

Q. You did pay interest?

A. I think I did, yes. I think I made one payment of interest.

Q. Was that payment for the entire series of coupons, or only a portion of it?

A. I can't tell that.

*Testimony of S. Schoyer, Jr.*

S. SCHOYER, JR., called on behalf of complainant, after being duly sworn, testified as follows:

Direct examination by Mr. FERGUSON:

Q. Mr. Schoyer, you appeared in the original bill in this case, didn't you?

A. I did.

Q. And you were aware of the application for the appointment of a receiver?

A. I call the attention of the counsel to the fact that I am attorney of record, and that I don't propose to be examined.

By Mr. FERGUSON: What I propose to prove by Mr. Schoyer is this: That when the bill was filed and the argument had, and Judge Buffington decided that he would not appoint a receiver, that on the day that Mr. Schoyer, the counsel for the defendant, received notice of the determination of Judge Buffington not to appoint a receiver, that counsel for the plaintiff then, Mr. Schoyer being present, or being brought into court very shortly afterwards, called the attention of the court to the fact that there was no insurance in favor of the mortgagee, and that that was a matter that ought to be considered before he determined the question as to whether a receiver should be appointed or not, and that counsel for plaintiff insisted
91 that in the absence of insurance, a receiver shall be appointed; that Mr. Schoyer, his clients, the Penn Plate Glass Co., by its officers and Mr. Kann being present, denied that notwithstand- — the claim of the plaintiff they were bound to insure, and an informal discussion then arose, and that the defendants, Kann and the Penn Plate Glass Co., through the witnesses, denied their liability to insure, but said that to avoid the question, they would give the stipulation that has been given in evidence in this case, executed by Kann and Wertheimer, that if they were bound to insure, the insurance money should stand for the benefit of the mortgagee.

By Mr. SCHOYER: This is objected to as incompetent and irrelevant and calling for loose conversations of counsel in the presence of the court, and an unfair and an unjust interpretation of what transpired during argument and discussion before the court. All that did pass before the court is fully within the knowledge and comprehension of Judge Buffingten, and that as respects the giving of the bond referred to, that bond was, in point of fact, extorted by the plaintiff; and as respects that, the record speak- for itself.

Q. Now, then, it is a fact, isn't it, that after Judge Buffington had declined to appoint a receiver, and after counsel for the plaintiff insisted that he had not considered the question of the absence of insurance——

A. I decline to answer on the ground that I am attorney of record.

Q. It is a fact, isn't it, that I insisted that we were entitled to insurance?

A. I decline to answer.

Q. It is a fact that, having so insisted, that you then, at the suggestion of the court, reserving the question of whether you were bound to insure, gave the stipulation signed by Kann and Wertheimer?

A. I decline to answer.

92 *Testimony of J. Scott Ferguson.*

J. SCOTT FERGUSON, a witness called on behalf of complainant, after being duly sworn, testified as follows:

Direct examination by Mr. BLANC:

Q. Mr. Ferguson, your firm is associated with the firm of Turner, McClure & Ralston as attorneys for the plaintiff in this case?

A. We are.
Q. You have had professional charge of this case?
A. I have.
Q. Under the original bill, did you, on behalf of complainant, make a motion to have a receiver appointed?
A. I did.
Q. And was that motion denied by the court?
A. That motion was denied by the court on the ground that the Penn Plate Glass Co. was solvent, and that it would be an unwarrantable interference with its business until the final determination of the case.
Q. At the time of making the motion, or shortly thereafter, did you say anything in the presence of the court, and Mr. Schoyer, representing the defendants, and the Penn Plate Glass Co., relating to insurance on the property?
A. According to my recollection, I received notice from Judge Buffington that he had concluded to deny the appointment of a receiver. According to my recollection, it was the following day I went into court, Mr. Schoyer was there, and Mr. Kann was there, and I said to the court that in considering the motion for a receiver, it occurred to me that the court had not considered the fact that this property was without insurance, that there was danger of fire, that *that* my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance,
they denying that we were entitled to insurance under the
93 mortgage, and under the circumstances, Judge Buffington said: "I can't decide that question," and intimated to them that if they were bound to insure they ought to protect us, and they denied they were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimer was given to us in pursuance of my demand for insurance, and filed in court, and is on file today.
Q. So that this bond was filed because you were insisting on insurance on behalf of the complainant?
A. Yes, sir.
Q. And when you say the other side denied their liability to insure, you mean the Penn Plate Glass Co. and W. L. Kann?
A. Yes, sir; those are the parties I mean; and they did file it.
Q. They gave what?
A. A bond signed by Wertheimer and Kann.
Q. That is the bond that has already been given in evidence in this case?
A. Yes, sir.

Cross-examination by Mr. SCHOYER:

Q. Who suggested the idea of a bond?
A. I did.
Q. And when it was prepared you saw it?
A. I saw it; yes, sir.

Q. And approved the terms of it?

A. I admit the approval of the terms. It was distinctly understood at that time that the Penn Plate Glass Co. and Mr. Kann denied that they were bound to insure; I insisted they were, and the bond was given in order to meet the views of the court, that if I was entitled to insurance I should have a bond. And if I was not entitled to insurance, I would get nothing.

(Objected to by counsel for responding defendant- as not responsive to the question.)

Q. You did approve of the bond and it was filed?

A. Yes, sir.

Q. And it has remained there ever since?

A. Yes, sir.

94 Q. The bond referred to is the one that you have offered in evidence under the supplemental bill?

A. Yes, sir; the same bond of Mr. Kann and Mr. Wertheimer, I don't want to be misunderstood. Mr. Schoyer representing his clients expressly denied that they were bound to insure; I insisted that we were entitled to insurance, and the bond was given just as its terms set forth, that if they were bound to insure the insurance would stand for the benefit of my clients.

Counsel for complainant now offer in evidence the record of the proceedings in the court of common pleas of Westmoreland county, Pa., wherein George Cowen and others were plaintiffs and The Pennsylvania Plate Glass Company were defendants, in which Joseph W. Stoner was appointed receiver, and they particularly offer in evidence that portion of the record in which receiver's certificates were authorized to be issued for the purpose of insuring the property of the Pennsylvania Plate Glass Company, and in which the receiver claims credit for moneys expended for the purpose of effecting such insurance.

(Objected to by counsel for responding defendants as irrelevant and incompetent, and as respects the particular matters referred to as contained in the said record, counsel states that he does not know that the record will show what it is claimed it will show.)

Counsel for complainant state that they propose to call attention upon the argument at the hearing to all the testimony taken under the original bill by the defendants from W. L. Kann and from Allen Marthens contained on pages of the stenographer's typewritten minutes beginning with page 148 and ending with page 233, as contradicted by the evidence given under the supplemental bill, and also as bearing in itself upon the issues in this case under the supplemental bill.

By Mr. SCHOYER: I have agreed that the testimony taken,

95 and any part of it, may be offered in evidence subject to objection, and if the counsel offer it in evidence I will then object to it as irrelevant and not within the terms and meaning of the issues of the supplemental bill.

Counsel for complainant offer in evidence the mortgage of the Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company, dated January 1st, 1891, recorded in the recorder's office of Westmoreland county, Pa., in M. B. No. 43, pages 1, etc., a copy of which is attached to the supplemental bill filed in this case.

(Objected to by counsel for responding defendants because the said mortgage, or copy thereof, has not been made part by exhibit of the supplemental bill.)

Counsel for complainant offer in support of this the answer to the original bill admitting that the copy thereof attached to the original bill is a correct copy.

(Objected to by counsel for responding defendants because the mortgage referred to was not made part of the supplemental bill as an exhibit.)

Counsel for complainant offer in evidence the original mortgage.

(Objection renewed by defendants' counsel.)

Counsel for complainant offer in evidence the deed made by Stoner, receiver, to W. L. Kann, dated July 2nd, 1894, recorded in the recorder's office of Westmoreland county, Pa., in Deed Book vol. 236, page 257, showing a conveyance of the property involved in this case to W. L. Kann, subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York, January 1st, 1891, recorded in Westmoreland county, in Mortgage Book No. 43, page 1.

(Objected to by counsel for responding defendants for the reason that, so far as the recitation of a part of that deed is concerned, the deed itself described the order of the court to the receiver to sell "subject to the lien of the first mortgage of $250,000, with interest thereon," appearing on lines 22 and 23 of the second page of
96 the certified copy of said deed, being Defendants' Exhibit No. 111, under the original bill, H. D. Gamble, commissioner.)

Counsel for complainant offer in evidence deed of William L. Kann and wife to the Penn Plate Glass Company, bearing date July 1, 1895, recorded in recorder's office of Westmoreland county, Pa., in Deed Book vol. 250, page 37, conveying to the grantee the property covered by the mortgaged involved in this case, "subject to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for $250,000, dated January 1, 1891, recorded in Westmoreland county, in Mortgage Book vol. 43, page 1."

Counsel for complainant offer in evidence the book of the Pennsylvania Plate Glass Company purporting to be a stock ledger marked in the hearing in this case under the original bill as Exhibit No. 2, H. D. Gamble, examiner, particularly offering page 134 of that book showing transfers of stock to William L. Kann under date of December 19, 1893, from George Cowen, certificate No. 425, one share of stock, and under date of February 21, 1894, from Cowen, Semmer and Frederick, certificate No. 434, 822 shares.

Counsel for responding defendants object to the offer as irrelevant and incompetent; and further object to it for the reason that the

particular entry in relation to the 822 shares is in handwriting not hitherto proved, nor is there any evidence to show at what time and under what circumstances it was entered.

Counsel for complainant offer in evidence Exhibit No. 5 given in evidence by the defendants in the hearing on the original bill and marked "H. D. G., examiner;" and particularly call attention to the stubs on that exhibit marked "Exhibit No. 425," purporting to show one share issued to W. L. Kann from George Cowen on old certificate No. 407 dated Dec. 19, 1893; and certificate No. 434 for 822 shares, purporting to show an issue to Wm. L. Kann for
97 that number of shares under old certificate, see stub No. 432 under date of Feb. 21, 1894; and to the stub No. 432 showing as follows: Certificate No. 432, 822 shares issued to George Cowen old certificate No. —; Feb. 21, 1894; old certificates as follows: A. C. Boyd & Co., No. 4, 50 shares; A. C. Boyd & Co., No. 275, 5 shares; A. C. Boyd & Co., No. 276, 5 shares; George Cowen, No. 503, 1 share; George Cowen, 2, 1 share; George Cowen, 374, 278 shares; George Cowen, 363, 25 shares; George Cowen, 359, 1,000 shares; Philip Semmer, 408, 900 shares; Philip Semmer, 409, 50 shares; Philip Semmer, 410, 434 shares; Philip Semmer, 430, 10 shares; George S. Frederick, 429, 1 share; total, 2,466 shares. One-third of this issued to George Cowen, 822 shares, No. 432; one-third of this issued to Philip Semmer, 822 shares, No. 433; one-third issued to W. L. Kann, 822 shares, No. 434; total, 2,466 shares.

All of this objected to by counsel for responding defendants for the reason that the certificates fail to show any receipt or evidence of a receipt by Mr. Kann of any of those certificates issued to him.

Hearing here adjourned until Wednesday, Sept. 14th, 1898, at 10 o'clock a. m.

And now, to wit: Wednesday, Sept. 14, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., examiner.

Present: Same parties.

PHILIP SEMMER recalled.

Cross-examination by Mr. SCHOYER:

Q. When *you were* subpœnaed as a witness in this case?

A. It seems to me about a week ago this time. I was subpœnaed once or twice before, I think, in practically the same case, but this subpœna, I think, was a week ago.

Q. Had you any consultation in respect to your testimony
98 with counsel or any other parties connected with the plaintiff?

A. Not in the least. The subpœna was quite unexpected.

Q. I mean, did you have any consultation as to what your testimony was to be?

A. None whatever.

Q. You are a member of the firm of A. C. Boyd & Co., are you not?

A. Yes, sir.

Q. You also brought a suit, did you not, against Mr. Kann in Westmoreland county?

A. Yes, sir.

Q. Founded on the alleged agreement between you and Mr. Kann for the advance of money about which you testified, and for damages arising from his failure to comply with that agreement?

A. Yes, sir.

Q. That was tried?

A. It was.

Q. And a verdict against you?

A. Yes, sir.

Q. Mr. Kann entered up the $10,000 judgment note that you referred to?

A. Yes, sir.

Q. And execution was issued?

A. Yes.

Q. Did you, as president, or in your own right, interfere with the entering of that judgment note or ask to have it opened in any way?

A. I can't recall the exact proceeding.

Q. Did you attempt to set aside that $10,000 note before the property was sold on the execution?

A. I think as president of the company I did make some effort. I don't recall what I did.

Q. The point is, did you, either individually or as president of the company, apply to the court to open that $10,000 judgment and set aside the execution before the property was sold on the execution?

A. I can't positively state without referring to the records at this time.

Q. Is that the best of your recollection?

A. The best positive recollection I think there were some efforts made, but what they were I haven't the remotest idea at this time.

Q. You knew Mr. Kann applied for a cautionary judgment for the rest of his debt?

A. I have some remembrance of such proceedings.

99 Q. You know you were a party to that proceeding, do you not?

A. In what way?

Q. As a defendant in his bill. Was not a bill filed at No. 267 in equity in the court of common pleas of Westmoreland Co. by W. L. Kann against the Pennsylvania Plate Glass Co., Philip Semmer, president, Stoner, secretary, and Philip Semmer and Joseph W. Stoner individually, to procure the decree for a cautionary judgment for the amount of money still outstanding?

A. There was such a bill.

Q. Did you appear, sir, to that bill and set up the alleged arrangement between you and Mr. Kann testified to by you in chief in this case?

A. I don't recall.

Q. Don't you know you didn't?

A. I think not. I can't recall positively, Mr. Schoyer. There were so many bills filed at the time, and I——

Q. How is it possible, Mr. Semmer, that when you so distinctly remember the alleged arrangement which you testified to between you and Mr. Kann, and when you brought the suit for damages against Mr. Kann, that you can't recollect what other steps you took to assert your rights and prevent Mr. Kann from asserting a claim against the company for the amount of money which he alleged he had advanced?

A. I have been trying to forget those proceedings three or four years back, Mr. Schoyer, and pay attention to other matters. Mr. Kann did us all up so thoroughly and well that I have been trying to get away from whatever proceedings took place at the time. If you will, however, aid me by coming out and letting me know exactly what you want, I will give you the best answer that I know of.

Q. How does it come that you have not been able to forget the alleged contract you have testified to in your effort to forget all about these things?

A. It would be a hard matter to forget the fact that Mr.
100 Kann's proceedings did me out of everything I ever possessed. I'll never forget that.

(Counsel for defendants object to the answer as not responsive and scandalous.)

Q. After this contract, Mr. Semmer, that you had testified to in chief was made, did you report to the board of directors, of which you were the president, and to the executive committee, of which you were a member, the terms of that contract with Mr. Kann?

A. I am under the impression that I did not.

Q. Can you give a reason why you did not?

A. It was a private contract that was made between individuals conditional with the company complying with a portion of the arrangements which were carried out by the company, and I think I never reported the real considerations to the company that passed between me and Mr. Kann.

Q. Do I understand you to mean that the alleged contract with Mr. Kann that he should advance $100,000 to the company was a private contract, and did not interest the company itself?

A. It was a private contract, inasmuch that it did not concern the company what consideration Mr. George Cowen and myself paid Mr. Kann for advancing this money.

Q. Why didn't you then tell the company that you had a contract with Mr. Kann by which he was to be the treasurer and director and was to advance $100,000 for which he was to have judgment notes for your protection and for his as you have stated the contract to be? That was not private, was it?

A. The best of my remembrance is that the board of directors were informed that Mr. Kann would make efforts to take himself or through other parties the unsold preferred stock of the company which amounted to about $160,000, conditional that he was elected

a director and given absolute financial control of the com-
101 pany. I think that is all the board of directors or the company were ever advised of in reference to the contract.

Q. Mr. Semmer, an auditor was appointed to distribute the funds in the hands of the receiver, Mr. Stoner, was there not?

A. There was.

Q. And you had claims presented there on your own behalf which had been allowed by the auditor, had you not?

A. I think I had a salary claim of $600 on the list.

Q. Now, among the first audits had on those funds, the cautionary judgment of Mr. Kann was presented and allowed and sustained by the court below, was it not?

(Objected to by counsel for complainant as not cross-examination and irrelevant.)

A. I can't recall.

Q. Did you go before that auditor and make an objection to the allowance of that claim, whether it was a judgment or whether it was for the debt covered by that judgment, in any of the proceedings whatever, on the ground that he was not entitled to recover it because of his failure to comply with the alleged contract you have set up here in chief?

A. I can't recall positively.

Q. Don't you know you didn't?

A. No.

Q. Don't you know you did?

A. Not positively.

Q. What is your best impression?

A. I have the impression that there was steps taken, but what they were I couldn't recall at this moment.

Q. You have the record,—look.

A. I know you have the record there, but so far as you have gone I don't see what you are getting at.

Q. Did you go before the auditor and object to Mr. Kann getting the fruit of that cautionary judgment or of the debt covered by that cautionary judgment on the ground that he had violated the contract which you have testified to in chief?

A. It strikes me at the moment that in the interest of all creditors I may have done so.

Q. Look at the record.

102 By Mr. FERGUSON: The record shown the witness is not the record. It is a private paper book, and I object to it.

Q. How clear is that impression; I am only showing you the record to show that you are wrong?

A. I am willing to be corrected. I have tried to discharge all those troubles from my mind, and there were so many bills filed that I can't untangle one from the other at the present time. If you will aid me a little and point out what you are after, I will try and give you the answer to the best of my knowledge.

Q. Do you know anything about the suits that were brought in your name?

A. I have some recollection of the suit you mentioned before.

Q. Mr. Semmer, in the suit that you brought against Mr. Kann—the suit that you and Mr. Cowen brought—you made an affidavit of claim, did you not?

A. I did.

Q. In that affidavit of claim did you allege that the contract existing between you and Mr. Kann was that Mr. Kann was to advance $100,000 and that judgment notes were to be given to him for your protection and his own?

A. I have some remembrance of some statement] as to (interrupted)——

Q. Did you in that affidavit of claim not assert that Mr. Kann was entitled to these judgment notes, but had agreed not to enter them up so long as you were president and he treasurer of the company?

A. I have some remembrance of that. It was part of the understanding.

Q. But you did not state that in your testimony-in-chief?

A. I can't recall what I testified to.

Q. Yesterday.

A. Oh, no; I don't think that occurred to me.

Q. Did you not in that affidavit say, among other things: "Plaintiff further agreed by reason of his control of the stock in said company to elect the said defendant a director and treasurer of said glass company, Philip Semmer, the plaintiff, was to endorse,
103 together with the defendant, notes to the amount of $40,000 and furnish all additional money required by said glass company, which money was to be furnished by the defendant to the plaintiff, for the use of the said Pennsylvania Plate Glass Company, which glass company, by its proper officer, was controlled by the plaintiff herein, was from time to time to execute and deliver to the defendant judgment notes for such sums of money as he had advanced, endorsed by the defendant and said Semmer as aforesaid; which notes it was specifically agreed, were to be held as protection merely to the defendant, not to be used, collected or payment thereof enforced, while defendant continued to act as treasurer of said glass company, which he has done since January, 1894, and which he still continues to do." Did you not so swear?

A. It is quite evident that I must have made that statement.

Q. This affidavit was filed, was it not, and was made on the 6th day of October, 1894?

A. Somewhere about that time.

Q. When your memory was much fresher about the *the* contract between Mr. Kann and yourself than it is today?

A. Yes, sir.

Q. In the light, sir, of this affidavit, which is true, the averments in the affidavit which I have just read to you or your testimony given here yesterday in chief?

A. Both are true.

Q. How was it possible, sir, for Mr. Kann to take judgment notes which he was to hold merely for protection to himself so long as you were president and he was treasurer, when he had, as you have sworn here yesterday, taken these notes for the joint benefit of yourself and Mr. Kann?

A. It is not reasonable to suppose that I would lend my endorsement unless there was a private understanding. It was also for my protection.

Q. That is your reason?

A. Yes.

Q. I hand you a paper on the letter-head of the People's
104 national bank, dated Pittsburg, January 15th, 1894, purporting to be signed by W. L. Kann, Philip Semmer and Joseph W. Stoner, and ask you if that is your signature to that paper?

A. That is my signature.

Q. Don't you know, sir, that at that time an executive committee meeting was held that was organized by electing yourself president and J. W. Stoner secretary of the same, and that you, Stoner and Kann were present, and that upon your motion it was resolved that this company issue to the order of W. L. Kann, as collateral for money loaned and endorsements, a judgment note to the amount of $10,000, and any other amounts required to meet the Pennsylvania Plate Glass Co.'s maturing liabilities, which was seconded by Stoner and carried; and do you not also know that at that meeting the executive committee reported that they had found, on looking into the maturing liabilities, including pay-rolls, that this amount of money would be required immediately to meet maturing obligations and keep this company in a working condition; and I refer you to this paper to enable you to refresh your memory.

Paper shown witness offered in evidence and marked Defendants' Supplemental Exhibit No. 1.

(Objected to by counsel for complainant as not tending to contradict the witness' examination-in-chief, and as irrelevant and not cross-examination.)

A. I remember of having signed this document.

Q. Do you not know, sir, that at that meeting three judgment notes were presented—one for $10,000, signed by Joseph W. Stoner, secretary, and by you as president; and two others in blank which were not to be filled up until advancements were made; and I hand to you the two blank notes, the other being on record and filed in Westmoreland county?

A. There was only one note presented at that time which was signed for $10,000. These were subsequently, quite a number of days, offered for my signature and I refused to sign them.

105 Q. The point is, were these at that day present and signed by Stoner at the time the other $10,000 note was signed?

A. I have no idea when Mr. Stoner signed those.

Q. Were they present at that meeting?

A. No; I am quite positive they were not.

Q. Your testimony was taken, was it not, in your suit in West-

moreland county against Kann at No. 977 May term, 1894, in the court of common pleas of Westmoreland county, Pa.?

A. Yes, sir.

Q. You were a witness in your own behalf, were you not?

A. Yes, sir.

Q. Did you not at that time state among other things as follows: "And the result of these different interviews was my trips to New York to see Mr. Cowen, whom I had to consult. He authorized me to make the best arrangement with Mr. Kann that could be made. We were in pressing need of money, and I told Mr. Kann so and informed him we were owing a great deal for wages, and during these trips, and realized our need, and practically suggested to Mr. Cowen to have a receiver appointed. I was hardly able—I felt that I was not able to carry the load any longer, and Mr. Cowen would not listen to the appointment of a receiver. He claimed that his firm, the house of N. Cowen & Son, had been in business 39 years, having never been connected with a failure, and authorized me to make a contract with Mr. Kann, who seemed to be anxious to get into the plate-glass business; and the result of it was that there was an agreement entered into between Mr. Kann and myself." Did you so testify?

A. Yes.

Q. It is true, is it not, that at that time you knew the concern was absolutely insolvent and that your liabilities were in the neighborhood of one hundred and fifty to one hundred and sixty thousand dollars? Is that so?

(Objected to by counsel for complainant as not cross-examination and as irrelevant and incompetent.)

A. I must have certainly knew it to give up (interrupted)——

Q. Answer my question, yes or no.

106 A. Yes.

Q. Did you report that condition of affairs to Mr. Kann when you made such a contract with him—that the concern was insolvent and that you thought of having a receiver, and that you owed—the concern owed—from one hundred and fifty to one hundred and sixty thousand dollars?

A. I have no recollection of what I may have reported to Mr. Kann aside from showing him the books of the company.

Q. Don't you know, sir, that you made a report as president of the company of the condition of the company for the year ending December 31, 1893?

A. I have some remembrance of that.

Q. Showing a net profit of $25,177.83, and I hand to you the trial balance and ask you if that is not the sheet that was so presented?

(Objected to by counsel for complainant as not cross-examination and as incompetent and irrelevant.)

A. So far as I can see, it seems to be the one.

Q. Was not this paper presented by you to Mr. Kann for the pur-

pose of showing the condition of the company at the time the alleged contract was consum-ated that you have testified to?

A. Mr. Kann had full access to our books.

Q. Can't you answer that question? Didn't you hand this paper to him?

A. I can't recall that particular paper, but he had full access to all of them so he may have seen it.

Q. Didn't you yourself give to him this paper for examination?

A. I can't recall what papers I showed him.

Q. Don't you know that this statement was false, and that for the year ending December, 1893, the net losses were $119,000?

(Objected to by counsel for complainant as not cross-examination and involving an issue not at all pertinent to this case.)

107 Q. Did you know that a balance-sheet had been made up showing a net loss of $119,000 or $120,000, and that that was corrected or sought to be corrected by a surrender of stock and by the various stockholders, and that stock was so surrendered and carried as cash, and the losses wiped out and this apparent profit made?

(Objected to by counsel for complainant as not cross-examination and involving an independent issue not at all pertinent or relevant to the present case.)

A. I have some remembrance of such a loss which occurred previous to my management and the loss was made up by the surrender of stock held by some of the larger stockholders. That statement there was evidently prepared subsequent to that surrender of stock.

Counsel for responding defendants offer in evidence the paper referred to, marked Defendants' Supplemental Exhibit No. 2.

(Objected to by counsel for complainant as not cross-examination and as irrelevant.)

Q. I hand to you a paper purporting to be a record to the stockholders of the Pennsylvania Plate Glass Co., and ask you whether or not that is your signature?

A. That is my signature.

Q. Is that the report which you made?

A. Yes, sir.

Q. In that report, sir, did you not state as follows: "Trusting that the above will meet with your approval, and hoping that the new board elected today will co-operate and act as a unit in the management of the company's business for the coming year. I close with an attached copy of our December statement showing net earnings of $25,177.83 against a loss of $100,000 for our first and second years' operations"?

(Objected to by counsel for complainant as not cross-examination and irrelevant.)

Q. And did you not know at the time of making this report, that

the losses of the year 1893 had been apparently overcome by a surrender of the capital stock to an equivalent amount?

108 (Objected to by counsel for complainant as not cross-examination and irrelevant.)

A. I know that loss occurred.

Q. Why did you not so state in this report for the inspection of Mr. Kann and of all?

(Objected to by counsel for complainant as irrelevant and not cross-examination.)

A. Mr. Kann had access to the affairs of the company long prior to the issuing of that report.

Q. Do you mean to state, sir, that Mr. Kann ever had any access to any books prior to January 10th, 1894, except this statement and the December statement, Exhibit No. 2?

A. It strikes me very forcibly that he must have. He would not have accepted the position and the management unless he had.

Q. That is argumentative. You don't know?

A. No; I won't be positive.

Q. Don't you know, sir, that in your testimony in your case against Mr. Kann that you were asked the following question and made the following answers: Q. "Did you go into court as president of the company and set up this contract and ask the court to withhold execution upon the judgment? A. I cannot recollect. Q. You cannot recollect? A. No, sir. Q. Don't you know that at the time the judgment was entered you knew about it and you never went into court at all to stop the enforcement of that judgment? A. I believe I was asleep during those forty days; I was not myself." Q. Did you so testify?

(Objected to by counsel for complainant as not cross-examination and irrelevant.)

A. I have some remembrance to testifying to something like that.

Q. Don't you know, sir, that you issued a circular, dated North Irwin, Pa., March 31, 1894, to the stockholders of the Pennsylvania Plate Glass Company, with reference to procuring the ap-

109 pointment of a receiver; and I hand you a circular and ask you if that is your signature?

A. That is my signature.

Counsel for responding defendants offer in evidence the circular referred —, in connection with other testimony to be offered, which is marked Defendants' Supplemental Exhibit No. 4.

(Objected to by counsel for complainant as incompetent and irrelevant and not cross-examination.)

Q. Was that meeting held called for by that circular?

A. My remembrance is there was a meeting held.

Q. Didn't you preside at that meeting?

A. I can't recall.

Q. Did you not, at that meeting, as president of the company, present a statement of the Pennsylvania Plate Glass Company under date of March 17, 1894, in which the indebtedness to W. L. Kann was put at $28,500, and a judgment of $10,000, and I hand to you a paper and ask you if that was not the identical paper so presented?

(Objected to by counsel for complainant as not cross-examination and as incompetent and irrelevant; and counsel for the complainant, The Farmers' Loan and Trust Company, now give notice that they will insist upon the payment by the defendants represented by Mr. Schoyer, of all costs for taking down testimony of this nature and printing the same for the consideration of the court.)

A. This seems to be a copy of the paper.

Q. Did you state to the stockholders at that time that Mr. Kann had no valid rights to this claim to be a debtor of this company to the amount of $285,000 because of his failing to comply with the contract which you swore in this case yesterday existed between you and Mr. Kann?

A. I have some recollection of making some statement; what it was I can't recall.

Q. Did you not present this claim to be considered as one of the debts? Did you present it as one of the debts and give the reasons for it to the stockholders?

110 A. The record of the meeting will show. I can't recall what occurred at that meeting.

Q. Now, Mr. Semmer, recalling the fact of the insolvency of the Pennsylvania Plate Glass Company, your resolution before the executive committee to give judgment notes which has been read, your failure to attack the claims of Mr. Kann in any manner, shape or form when he sought to put them into judgments, your withholding statements from the board of directors as to the contract between you and Mr. Kann as you have stated it to be in your testimony here yesterday, the fact that you had called a meeting of stockholders for the appointment of a receiver in which you included this indebtedness as a just debt or liability of the company without a statement of your defences or of what the contract was and why Mr. Kann should not be a creditor—in view of all these things I now ask you, do you still adhere to the testimony you gave here yesterday that such a contract as you then testified to did, in point of fact, exist?

(Objected to by counsel for complainant, first, for the reason that the question assumes facts not shown to exist and not admitted by the witness; second, as not cross-examination; and generally as incompetent and irrelevant.)

A. My answer to that is that I refer to the stock certificate books and stock ledger of the company to the transfer of the $86,000 worth of stock to Mr. Kann without consideration as having carried out my part of such an understanding.

Q. Do you mean to state that you never transferred on the books of the company at any time any stock to Mr. Kann?

A. I do.

Q. Don't you know, sir, that at a meeting of stockholders of the Pennsylvania Plate Glass Company held in North Irwin, on Wednesday, April 11, with Mr. John M. Stewart as chairman and W. Thompson Zell as secretary, at which you were present, you
111 made a motion as follows: "Motion of Philip Semmer, seconded by Mr. N. Hutkoff, that a call be made upon those present as to the number of shares held by each one, carried;" and that that call was made upon each one present with the following result, among others, Philip Semmer, 800 shares; and I ask you if that is not the original minutes kept by Mr. Zell as secretary?

(Objected to by counsel for complainant as not cross-examination, nor tending to weaken the testimony of the witness in chief, and having no relation thereto.)

A. The 800 shares here mentioned is my remaining holdings after having assigned my portion of stock to Mr. Kann.

Q. How many shares did you assign to Mr. Kann, and how many shares did you have?

A. Mr. Cowen and my joint holdings——

Q. I am asking how many shares you had.

A. I had the controlling interest.

Q. I ask you how many shares stood in your name on the books of the company before the alleged transfer to Mr. Kann.

A. I can't recall.

Q. Don't you know, sir, that so far from assigning or transferring these certificates, that you refused to execute the transfers of them and never did?

(Objected to by counsel for complainant as not cross-examination, and as irrelevant, and particularly the certificate No. 38, 50 shares, purporting to be preferred stock, as a matter not referred to or alleged in any way by the witness in his testimony-in-chief; and as to the other certificate, that there is no connection between it and the testimony of the witness in chief shown or proposed to be shown.

A. To the best of my remembrance, certificate No. 38, preferred stock, and certificate 433, common stock, are my present holdings in the old company, which I refused to assign to Mr. Kann under the threat of closing us up, and having assigned my portion in other certificates which you have no reference to to the full amount
112 of whatever was agreed upon. Those certificates are made out in M-. Kann's name, and these have nothing to do with those assigned to him whatsoever.

Q. Mr. Semmer, did you not, at 545 and 556 of May term, 1894, of the common pleas of Westmoreland county, which represents the suit brought and proceedings on the $10,000 judgment note and other matters, by Mr. Kann against the Pennsylvania Plate Glass Company, present a petition to that court asking for the following relief: "Wherefore petitioner prays the court to grant a rule on the

said W. L. Kann to show cause why the said judgment should not be set aside and the petitioner, as well as the other creditors, and also the said company, be granted such other and further relief as the circumstances of the case require;" did you not swear to such a paper on the 26th day of November, 1895?

(Objected to by counsel for complainant as not cross-examination and as irrelevant.)

Q. Did you, sir, in that affidavit assign as a reason that Mr. Kann had violated the contract which you have set up in this case in your testimony-in-chief yesterday, to wit, that he was to advance $100,000, and that he was to take judgment notes for your benefit as well as his own; did you set that up as a reason?

A. I have no clear recollection of that.

Q. Did you set up as a reason that you had made a contract with Mr. Kann that he was to advance $40,000 and so much more as the needs of the company should require, and that the judgment notes which were to be given to him were not to be entered or issued upon so long as he was treasurer and you president of that company; did you set that up?

A. I have some remembrance of setting up or testifying to that question. The $40,000 understanding was a provisional one pending Mr. Kann's taking up the $100,000 of preferred stock which he asked for and received the option of from the board of directors.

113 I agreed to endorse with him up to this amount—up to $40,000 of the company's paper for its immediate requirements.

Q. Don't you know, sir, that it was not until the middle meeting of February 14th, 1894, that Mr. Kann was given an option on the judgment notes or preferred stock as security on loans made?

A. He never had an option of both. It was one or the other.

Q. Don't you know, Mr. Semmer, that a considerable or some period of time after Mr. Kann became the treasurer and was making considerable advancements, that he became alarmed, and that you and he came to my office with respect of the Pennsylvania Plate Glass Company; that you produced to me a statement of the assets and liabilities of the company; and that I said to you upon examination that if that statement was true that it would require $75,000 to float the company; and don't you know that it was then and there agreed upon, or shortly afterwards, that an arrangement of this kind should be entered into, that preferred stock should be issued to the amount of $75,000; that Mr. Kann should be the purchaser of that preferred stock at par, the first stock to bear six per cent. interest, redeemable in five years, and that you and Mr. Cowen should have the option of redeeming that stock at par any time within the five years if you saw proper to do it; and that the common stock,—a majority of it, at least,—should be deposited with the Safe Deposit & Trust Company of Pittsburg, upon the trust that it should be voted so long as Mr. Kann was the holder of the preferred stock as Mr. Kann might direct; and that when you redeemed the preferred stock at par with accrued interest, that then this common stock was

to be transferred to you; and was not that understanding reduced to writing, agreed to by you and Mr. Cowen both at my office and at the Duquesne Club where I had been brought from a sick bed for that purpose; and that in point of fact it never was executed by you; but was not that the arrangement between you?

114 (Objected to by counsel for complainant as not cross-examination and irrelevant; and further for the reason that if at all pertinent, the writing referred to ought to be produced.)

A. My recollection is that Mr. Kann wanted such an arrangement subsequent to the original which I refused to enter into,—never did sign or agree to anything,—flatly refused to agree to any one-sided arrangement of the kind.

Q. Don't you know, sir, that it was in pursuance of this verbal arrangement,—this verbal understanding that this agreement would be carried out that these shares of stock took the form they did?

A. No, sir; those shares of stock were formed on the original agreement whereby Mr. Cowen and myself assigned to Mr. Kann one-third of our entire holdings, which was $260,000, making him about 800 shareholder and myself 800 shareholder.

Q. I now ask you to look at the dates of these certificates and say what they are to enable you to refresh your memory. I refer to certificate 433 common for 823 shares, and certificate No. 38 of preferred for 50 shares, the date thereon being the 21st day of February, 1894?

A. The dates are February 21, 1894.

Q. I now hand to you certificate No. 39 preferred, assigned by you to William L. Kann; and certificate 434 of common for 822 shares, signed by you as president, and ask you to give the date of those?

A. The certificates are dated February 21, 1894, and represent Mr. Kann's share of the division.

Q. I am asking you only for the date. I now hand to you certificate No. 37, preferred, for 50 shares to George Cowen, and assigned in blank by George Cowen and witnessed by you, and certificate 433 to George Cowen of common for 822 shares, also assigned in blank and witnessed by you, and ask you what the dates of those certificates were?

A. February 21, 1894.

115 Q. Mr. Semmer, Mr. Kann had advanced moneys before February 21, 1894, to the company?

A. Yes, sir.

Q. How does it come, sir, if these certificates were transferred, or to be transferred, to Mr. Kann in pursuance of the alleged contract you testified to here yesterday in chief, that these transfers were not made at the time you became treasurer instead of February 21, 1894?

A. Mr. Kann had as treasurer charge of the certificate book and transfer book and could have made them out the very day that he accepted the directorship in the company. I signed them as soon as he called for my signature.

Q. Don't you know, Mr. Semmer, that it was in pursuance of this

arrangement that I have asked you about in regard to the new issue of preferred stock to the amount of $75,000 that those certificates were so signed and prepared, and that you backed out and refused to transfer yours, and Mr. Cowen who had transferred his did agree, but that the deal fell through because of your refusal to enter into this agreement?

A. The certificates referred to there have nothing to do whatever in connection with this subsequent arrangement that Mr. Kann wanted to make. It was strictly in accord with our original agreement to assign him one-third of our controlling interest which we did. Mr. Cowen's signature was forced from him under threat of having the sheriff on us. I refused to be intimidated and refused to assign my shares of stock.

Q. Do you mean to say, sir, that any demand was ever made by Mr. Kann for money owed to him by the Pennsylvania Plate Glass Company before the 14th of March, 1894, at the meeting called to meet that demand and at which this sale of glass to Hutkoff was made?

A. I can't recall, but Mr. Kann constantly kept threatening to close us up unless we would assign him the entire controlling interest of the concern.

116 Q. Don't you know, sir, that you held in your possession proposed agreements between you and Mr. Kann and Mr. Cowen for a considerable period of time for consideration?

A. What date?

Q. And that you yourself fixed the date to bring Mr. Cowen to the Duquesne Club, Pittsburg, to meet me to consummate it?

(Objected to by counsel for complainant as not cross-examination and as irrelevant.)

A. The best of my remembrance is that I never was given possession of any proposed or otherwise agreement subsequent to the original. I know of such an agreement having been drawn up and remember reading a portion of it at the Duquesne Club. I simply refused to agree to it. I never had possession of a copy. I never was given one.

Q. Don't you know, sir, that at my office the matter was agreed upon, blocked out and I reduced it to writing and gave it to you; that it wasn't satisfactory to you and Mr. Cowen, and that I drew another and handed it to you; that you and Mr. Cowen considered it, and that you made the appointment to meet me at the Duquesne Club because I had been sick and away from the office and came in specially to have the matter consummated?

(Objected to by counsel for complainant as not cross-examination and as irrelevant.)

A. I remember the meeting at the Duquesne Club and remember positively of not entertaining any propositions that were proposed there; never signed them.

Q. But you knew of them?

A. I know that Mr. Kann (interrupted)——

Q. The papers were read and considered?

A. Mr. Kann insisted upon subsequent changing of the deal which I wouldn't agree to. I don't today recall the real contents of the deal or what he did propose excepting that at the time it struck me so forcibly one-sided; that he wanted all or nothing, and I (interrupted)——

117 Q. Do you mean to tell me, sir, that you ever asserted the existence of such a contract as you have now sworn to in my presence, or at any time during the preparation of these papers, or at any subsequent time until the suits were brought?

A. It was no business of mine to bring forth an arrangement already consummated to Mr. Kann's attorney.

Q. Do you mean to say that when you brought to me the statement of your affairs and I examined it and you agreed to it that it would require $75,000 to put it on foot, and that some arrangement ought to be made to induce Mr. Kann to do it, that you ever said that there was no necessity for it because I have a contract with Mr. Kann that he is to advance $100,000?

(Objected to by counsel for complainant as argumentative and as not cross-examination.)

A. I can't recall.

Q. I now ask you to look at these two papers and say whether these were not prepared and showed to you.

(Objected to by counsel for complainant as not cross-examination and as irrelevant; and particularly that the papers not having been executed or agreed to, are clearly irrelevant.)

A. My only remembrance is that I would not agree to it.

Q. Agree to what?

A. To any subsequent agreement from the original.

Q. Do you recollect these papers?

(Witness examines papers.)

A. I remember having become acquainted with the contents and what was wanted, and I refused to agree to them.

(Papers referred to, read to witness by counsel.)

Q. Having read these two papers to you, is your memory refreshed as to the interviews and the character and contents of these papers?

A. It is.

(Objected to by counsel for complainant for the reason that the matter inquired about is not cross-examination and wholly irrelevant.)

118 Q. You recall the fact that these papers were presented to you and considered, but you say you refused to execute them?

A. I do.

Q. And was it not in February, 1894, these papers were prepared and presented to you?

A. The best of my remembrance is, it was in the latter part of February; yes.

Q. I now ask you whether these papers were not read by me to you in your office, and afterwards at the Duquesne Club, were they not?

A. I don't remember you handing the papers to me at any particular time, but I know that having become acquainted with the contents I wouldn't entertain them.

Q. But you do recall a meeting at my office where a statement was made up and I stated that it would require $75,000 to float that company through?

A. I think you gave some advice to Mr. Kann at the time.

Q. And you were present?

A. He asked me to——

Q. You were present?

A. I was present at that time at his request.

Q. And Mr. Cowen was present too, was he not?

A. At the last meeting I think Mr. Cowen was present.

Q. How did it come, sir, I ask you again, that you didn't then and there state to Mr. Kann that this other contract which you have sworn to in your testimony-in-chief existed and was in force, and that therefore this arrangement was not necessary?

A. Simply for the reason that Mr. Kann had already up to that date advanced $28,000 under his original agreement, and I didn't think it was necessary to go into any subsequent agreement, and that the advancement made by him up to that time would force him to carry out the original agreement.

Q. Do you mean to say, sir, that Mr. Kann had ever advanced any money except after the judgment notes were voted for him by the executive committee that I have heretofore referred to?

A. I mean to say that the records of the company will show that Mr. Kann commenced at once to advance money shortly
119 after the election—possibly a day or two afterwards, and continued to advance money during all of January and all of February till the latter part of February to the extent of $28,000.

Q. Will you answer my question—whether he advanced one dollar before the passage of this resolution of January 15th, 1894, of the executive committee to give him judgment notes?

A. I am under the impression that Mr. Kann had advanced something like $2,500 before the date of this resolution, to the best of my recollection.

Q. All the rest was advanced afterwards?

A. Yes, sir; and before the latter part of February.

Q. Wasn't that $3,500 a note endorsed by the directors of the company which Mr. Kann procured to be discounted?

A. No, sir.

Q. What was it?

A. It was for money that was absolutely needed to pay the payroll.

Q. Was it by his check, or was it not by the discount of that note?

A. Mr. Kann endorsed a note endorsed by six of the directors some ten days before January 10th; I sold him that note outright at 9 per cent.

Q. That was the money you referred to?

A. No; it has nothing to do with it. I sold him this note; it was an outright sale. On January 15th, the date of this resolution, the best of my remembrance is that he had advanced $3,500, and on the same day advanced an additional $5,000, and I believe on the same day he was given the first $10,000 note. In fact, if my memory serves me right, the $10,000 note given to him exceeded $2,000 over the advancements up to that date.

(Objected to by counsel for responding defendants as not responsive to the question.)

Q. Mr. Semmer, you have in your testimony-in-chief talked about Mr. Kann having been paid the amount of his advancements. Do you mean by that that he got judgments, issued executions and attachments, adversary proceedings by which he received certain amounts of money of proceeds of sheriff's sales and of attachments? Is that what you mean when you say that was paid?

120

A. I have no distinct recollection as to the exact amount he received.

Q. Then you don't mean that the company as a going company drew money out of its own treasury and paid him as a creditor of the company?

A. No. No; I don't mean that.

Q. Do you mean to say that Mr. Kann did not advance the moneys which are represented by his various claims,—$38,500, or what it amounted to?

A. No; I don't mean to say that. I have every reason to believe that Mr. Kann advanced $38,500.

Q. And it went for the purposes of the company?

A. Yes.

Q. Don't you know, Mr. Semmer, that the only interest that Mr. Kann had as a stockholder of the company at the time he was elected and at the time he made the advances was one share of stock?

A. You can tell by the date of those certificates.

Q. Isn't this one share the only share receipted for by Mr. Kann on the books?

A. I don't know.

Hearing here adjourned until 2 o'clock p. m., same day, and met pursuant to adjournment.

*Afternoon Session.*

Redirect examination by Mr. FERGUSON:

Q. Mr. Semmer, do you remember whether or not any suit was brought by Mr. Kann against the Pennsylvania Plate Glass Company to recover for $28,500 in excess of the $10,000 judgment note

until after the bill had been filed for the appointment of a receiver and the receiver had been appointed?

(Objected to by counsel for responding defendants for the reason that the record is the best evidence.)

A. I would like to see the record.

121 Q. According to the record in No. 265, in equity, in the court of common pleas of Westmoreland county, in the case of George Cowen, R. H. Casey and Nathan Hutkoff, complainants, against the Pennsylvania Plate Glass Company; the bill for a receiver was filed on the 19th of March, 1894, and on that date Joseph W. Stoner was appointed receiver; according to the record, judgment was entered for W. L. Kann's use against the Pennsylvania Glass Company at No. 545, May term, 1894, on the 16th of March, 1894, on the $10,000 judgment note with interest January 12th, 1894, admitting a credit of $3,779.18; as it appears that the bill in equity at No. 267 of the common pleas court as aforesaid, in which W. L. Kann was plaintiff, and The Pennsylvania Plate Glass Company, Philip Semmer, president; Joseph W. Stoner, secretary; Philip Semmer and Joseph W. Stoner were defendants, was filed on April 21, 1894; and that under that bill an interlocutory decree was made on May 29, 1894, entering a cautionary judgment in favor of W. L. Kann against the Pennsylvania Glass Company for the sum of $32,500, with interest as follows: On $1,000 from January 15, 1894; on $6,000 from January 16, 1894; on $10,000 from January 24, 1894; on $5,000 from February 15, 1894, and on $10,000 from February 21, 1894, saving intervening rights as appears by the decree. First, I want to ask you whether, according to your recollection, the dates given correctly state the date at which the various advancements were made to Mr. Kann?

(Objected to by counsel for responding defendants, as the record itself is the best evidence, and the counsel has read from the record.)

A. The dates recited are about correct as to the time the money was given or advanced; notes were given on that day and discounted.

Q. Before that bill was filed, the receiver had been appointed, had he not?

A. Yes, sir.

122 Q. Did or did you not interpose any defence to the prayer of that bill, or was it committed to the receiver to make defence?

(The form of the question objected to by counsel for responding defendants as leading and as suggesting an answer.)

A. The best of my recollection, the receiver defended in the suits.

Q. Did you yourself interpose any defence?

A. Not that I remember of.

Q. After the receiver had sold the property and had filed his account, and the matter had been referred to an auditor for distri-

bution, state whether or not you were represented before the auditor by any attorney, and, if so, by whom?

A. I was represented by Mr. Charles A. O'Brien, among other creditors of the company.

Q. You and other creditors were represented by him?

A. Yes, sir.

Q. Were you present when Nathan Hutkoff was sworn before the auditor?

A. I was.

Q. And was Mr. O'Brien present, representing you and other creditors?

A. He was.

Q. Do you remember whether there was any offer in that matter of distribution to prove what the agreement was between Kann and yourself?

(Objected to by counsel for responding defendants, as the record itself is the best evidence of what transpired before the auditor.)

Q. I call your attention to this: Do you remember whether or not, when Hutkoff was on the stand, that Mr. O'Brien, as attorney for the exceptant, yourself and the S. R. Smythe Co., proposed to prove by the witness on the stand, Hutkoff and others, that at the time the $10,000 judgment was confessed by the directors of the Pennsylvania Plate Glass Co. it was represented by the said Kann to the directors that the judgment so confessed was to be held as a security for moneys advanced, and not to be entered up
123 and execution issued thereon; that if the said directors would confess the judgment and secure him in that way, that he would make further advancements of cash to meet the pressing debts of the concern to keep it on its feet and prevent insolvency; that part of this arrangement was that said Kann should be elected a director and treasurer of the company, and that the said Kann should take for the moneys already advanced the preferred stock of the company in payment, and that the judgment so confessed was to stand as a security for the execution of this agreement on the part of these directors to turn over to said Kann the preferred stock; and it was proposed further to show that the said judgment was executed and delivered to the said Kann before the same had actually been authorized by the directors.

By Mr. O'BRIEN: I intend to include in that also that the preferred stock of the company was offered to the said Kann in pursuance of that arrangement, and he refused to take the same as had been agreed upon. Do you remember whether that offer was made or not?

(Objected to by counsel for responding defendants as better proved by the record itself.)

A. That offer of testimony was made.

Q. Do you remember whether Mr. Schoyer was present at that hearing as attorney for W. L. Kann?

A. I can't recall.

Q. Do you remember whether Mr. Kann was represented by counsel?

A. Yes.

Q. And do you remember whether or not Mr. Kann's counsel, whether it was Mr. Schoyer or somebody else, at that particular time objected to the reception of that evidence?

A. I do.

Q. And it was excluded, was it not?

A. It was.

Q. Now, whether or not you attacked the bill in equity filed by Mr. Kann to have a cautionary judgment and a suit brought
124 by him upon the debt which he claimed to be due him, is or is it not a fact that you did attempt to attack it in the distribution in the funds of Stoner, the receiver?

(Objected to by counsel for responding defendants as leading and argument-ive.)

A. We object to it.

Q. You were shown this morning by Mr. Schoyer two certificates, one No. 434, common stock, dated February 21, 1894, issued to William L. Kann for 822 shares of the capital stock of the Pennsylvania Plate Glass Co., and one No. 39, issued to William L. Kann under date of February 21, 1894, for 50 shares of the preferred stock of the Pennsylvania Plate Glass Co., were you not?

A. Yes, sir.

Q. I am now about to show you these papers again. Did you observe who handed them to me for the purpose of showing them to you?

A. I think William L. Kann handed them to you.

Q. I wish you would state whether or not those two certificates represent one-third or the $86,000 of the stock of this company that you referred to in your testimony-in-chief. Are those the certificates that were delivered to Mr. Kann in pursuance to the agreement that you testified to in chief?

A. They are.

Q. You were also shown by Mr. Schoyer this morning a certificate No. 433, dated February 21, 1894, issued to you for 822 shares of the capital stock of the Pennsylvania Plate Glass Company on the certificate dated February 21, 1894, for 50 shares of the preferred stock of that company issued to you; another certificate bearing the same date for 822 shares of the capital stock of that company issued to George Cowen, numbered 432; and another certificate issued to George Cowen for 50 shares of the preferred stock of that company No. 37. I wish you would state whether or not those are the certificates that Mr. Kann demanded at the interviews referred to at the Duquesne Club and Mr. Schoyer's office, and which you declined to give because they were in excess or contravention of the
125 original agreement.

A. They are. That is, I speak for myself. Mr. George Cowen——

Q. Were the Cowen certificates a part of the original agreement,—the ones I have called your attention to last?

A. Yes; they are part of the original agreement. . The three parcels of certificates represented our original holdings and are divided in three equal parts.

Q. I understand the original agreement was he was to get in round numbers, $86,000.

A. About that, yes.

Q. Now, the first two certificates that I showed you issued to Kann would make 822 shares which would be $82,200 of the common stock, and $5,000 of the preferred?

A. That is the proportion.

Q. Was or was not that a full compliance with the original agreement?

A. A full compliance with the original agreement.

Q. Now, then, the subsequent certificates which Cowen gave, amounting to the same amount,—was that in excess of the original agreement?

A. They were. They were forced out of him under threat of having the sheriff on us.

Q. And that is correct?

A. That is absolutely correct.

Recross-examination by Mr. SCHOYER:

Q. Mr. Semmer, Mr. O'Brien you say was attorney for you in this audit and made the offer as your attorney, among others, when Mr. Hutkoff was sworn so read to you by Mr. Ferguson, on redirect examination just now?

A. Yes.

Q. The offer as so made by your attorney before the auditor referred to recites that, at the time the $10,000 judgment was confessed to Mr. Kann by the directors, Kann represented to the directors that the judgment so confessed was to be held as a security for moneys advanced and not to be entered up and execution issued thereon; that if the said directors would confess the judgment and secure him in that way, that he would make further advance-
126 ments of cash to meet the pressing debts of the concern to keep it on its feet and prevent insolvency; that part of that arrangement was that said Kann should be elected a director and treasurer of the company, and that said Kann should take for the moneys already advanced, the preferred stock of the company in payment; and that the judgment so confessed was to stand as security for the execution of this agreement on the part of these directors to turn over to said Kann the preferred stock; and it was proposed further to show that the said judgment was executed and delivered to the said Kann before the same had been actually authorized by the directors. In your testimony-in-chief in this case you have said that Mr. Kann (on page 26) advanced the moneys to the company on the personal understanding between him and myself (meaning you) "that he was to endorse with me notes of the

Pennsylvania Plate Glass Company whatever amount was needed and the company was to give us for our protection judgment notes pending his being able to make financial arrangement to furnish this money from the sale of preferred stock or otherwise. We understood he was to and in fact he asked for and got an option on the unsold preferred stock of the company for that purpose;" that the said notes were to be judgment notes and were to be taken for his protection and yours jointly. Why did you not state, through your attorney before the auditor that these notes were legitimately given, legitimately accepted and were to be held in trust by Mr. Kann for himself and for yourself?

A. At that hearing we made an attempt to put a witness on the stand to testify that such a contract existed, and it was all ruled out; we had no opportunity to state our case.

Q. You refer then to the offer which I have just read?

A. Yes; we had some two or three witnesses on the ground from New York.

Redirect examination by Mr. FERGUSON:

Q. When you refused to execute these other judgment notes, was Mr. Kann present?

A. Yes.

127 Q. Did you state the ground of your refusal at that time?

A. I can't recall exactly what statement I made, but I saw that he didn't intend to carry out his agreement, and refused to execute the note.

Q. He had already got the $86,000 of stock?

A. Yes, sir.

Recross-examination by Mr. SCHOYER:

Q. Don't you know that Mr. Kann asked you to put your name to those two judgment notes on the day after the meeting of the executive committee of the 14th of March, 1894, to take means to pay his indebtedness, at which meeting it was resolved to proceed to have a receiver; and did you not then refuse to sign it, and that for the first time in your office at Irwin, Pa.?

A. Our directors never held a meeting for the purpose of having a receiver appointed until Mr. Kann had entered judgment. I remember, however, it was the very last act that Mr. Kann did before entering the judgment, he made a final and last demand on me to sign those additional judgment notes, which I declined to do.

JOSEPH W. STONER recalled.

Direct examination by Mr. FERGUSON:

Q. I believe I asked you, Mr. Stoner, with reference to the policies of insurance that were outstanding at the time that you became receiver. Can you tell me now in what companies those policies were held?

A. No; I cannot.

Q. Have you any of them in your possession?

A. I can't find them; I made a diligent search for them, and the boxes that were brought in here with papers that were considered valuable, and books and things of that kind, were all down here and in good shape; but a number of papers were folded and put in packages that weren't considered of any special value and left in the Irwin factory, on an upper shelf; and unfortunately in the fire they were lost; and those policies were among those papers.

128 Q. Do you know whether they were there, or whether they were among the papers that were left with Mr. Kann?

A. They were left there at Irwin.

Q. You are sure of that?

A. Yes, sir; on an upper shelf that was prepared on purpose.

Q. You don't remember the names of any of the companies?

A. I do not know. It is so long past and gone and I would have to have more time to find out.

Q. Do you remember the names of the agents?

A. Why, yes; I believe I could give you the name of some of them.

Q. I wish you would do that, please.

A. Ringwald & Agnew and Mr. Zahn.

Q. Is he a Westmoreland County man?

A. No, he is a Pittsburg man.

Q. Any others that you can recall?

A. I believe there was a Greensburg man, William Wersing,—that is my recollection now,—I am not positive.

Q. When you applied to the court for leave to borrow $4,000 and issue your receiver's certificate as receiver for the purpose of insurance, you made your insurance in pursuance of that authority with the same parties, did you not, that had control of the previous insurance?

A. I did, so far as I could.

Q. Well, then, I call your attention to the record in No. 265 in the court of common pleas of Westmoreland county and shall read from the account that you claimed credit for: Cash paid Ringwald & Agnew, insurance, and W. A. Zahn, and again W. A. Zahn, and again W. A. Zahn, and again W. A. Zahn, and will ask you whether those are the insurance agents that effected the insurance to the amount of $330,000, or whatever amounts you succeeded in obtaining, that you were authorized by the court to effect.

A. I believe to the best of my knowledge they are the parties.

129 Q. Where are those policies of insurance?

A. Those are the ones that have been lost; they run out and——

Q. I first asked you about the policies that were outstanding before you became receiver, and I understood you to say that those were the policies that were lost.

A. By way of explanation, there was about one hundred and forty or fifty thousand dollars of insurance that had been taken out between January and the receivership's appointing that wasn't paid

for and part of this money that I got permission from the court to use was to go to make them good,—pay for them.

Q. All I want to get at is whether you could produce any of the policies of insurance,—whether they were issued before you were appointed receiver or whether they were issued afterwards.

A. I don't know that I can, after hunting for them diligently last night. I remember that some of them were (interrupted)——

Q. I don't care about that. Am I to understand that, so far as the policies themselves are concerned, they were, according to your belief, lost in this fire?

A. They were.

Q. And therefore they can't be produced?

A. No, sir; I failed to find them after hunting diligently.

Q. But your recollection is, that so far as any policies that were taken out by you as receiver are concerned, they were taken out, at least, through the agencies of Ringwald & Agnew and Zahn?

A. Yes, sir; to the best of my recollection.

Q. And your recollection also is that the policies existing before you were appointed receiver were taken out through the same agencies?

A. I believe they were. It was an understood matter that Ringwald & Agnew had been the agents and had the entire insurance in their care for four or five years.

Q. Did you keep any copies of your application for insurance?

A. No; I have no blanks.

130 Q. Did you keep any copy of your petition to the court for leave to effect insurance?

A. No, sir; I don't think I did. It is a matter of record in the courts.

Q. At whose instance, if you recall, did you make the petition to the court of common pleas for leave to issue certificates to the amount of $4,000 to insure the property to the amount of $300,000?

A. I don't remember any special instance now.

Q. As a matter of fact you remember that, among others who were insisting that you should do so were the Farmers' Loan and Trust Co. of New York as a mortgagee to the extent of $250,000?

A. I don't recall now, excepting that their attorneys, Hays & Noble, or at least they——

Q. They were insisting?

A. Yes.

Q. And it was their insistence, among other things, that led to that application, was it not?

A. Yes; and my own belief and knowledge that the property deserved protection for the benefit of creditors.

Q. And among other creditors was the mortgagee?

A. Yes, sir.

Q. And the insurance was for the protection of the mortgagee?

A. Yes.

Counsel for complainant offers in evidence the record of the court

of common pleas of Westmoreland county at No. 265 in the matter of the appointment of the receiver of the Pennsylvania Plate Glass Company.

Counsel for complainant also offers in evidence the certificates for the preferred stock referred to in the testimony and the common stock also referred to, the preferred stock certificate being No. 38, dated February 21, 1894, for 50 shares, and common stock certificate, being numbered 434, dated February 21, 1894, for 822 shares.

Hearing here adjourned until Thursday, September 15, 1898, at 2 o'clock p. m.

131 And now, to wit: Thursday, September 15, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., examiner.

Present: J. Scott Ferguson, Esq., of counsel for complainant; S. Schoyer, Esq., of counsel for responding defendants.

*Testimony of W. L. Kann.*

W. L. KANN, called on behalf of complainants as for cross-examination, after being duly sworn, testified as follows:

Direct examination by Mr. FERGUSON:

Counsel for responding defendants object to the right or power of the complainant to call the defendant as for cross-examination in equity.

Q. Mr. Kann, I show you a postal receipt attached to a paper filed in this case on the 20th of July, 1896, purporting to be signed by W. L. Kann by somebody. Who is that?

A. I guess I must have received that. That isn't my signature. It was signed by somebody who never had any authority to sign for me; but undoubtedly it got into our business office.

Q. Do you recognize the two notices addressed respectively to yourself and to the Penn Plate Glass Company as having been received at or about the date attached to it?

A. Well, the best of my recollection is I received a similar notice; as to the date I couldn't remember; but I suppose this is a copy, and I suppose that date is correct.

Q. And the man who signed the name W. L. Kann and the name Penn Plate Glass Company is, who?

A. I think that was L. Swift.

Q. And he was in the employ of the Penn Plate Glass Company at that date,—November and December, 1895?

A. Mr. Swift was in the employ of the company at one time,
132 and I don't doubt, from the fact that his signature is here, that he was at that time. I can't tell as to date.

Q. Do you know the handwriting of Joseph W. Stoner?

A. Yes; I think I could recognize it.

Q. Look at his receipt to the postal receipt there, and state whether that is his signature?

A. It don't look much like his signature, but it has some resemblance. He writes more of a slanting hand, but I think that is his signature. I think that we did receive a notice; whether this is a copy of it or whether this was the date I received it,—I have no recollection of the date, but I have a recollection of having received a notice the subject-matter being here, and being a demand for insurance.

Counsel for complainant offers in evidence the notice of the Farmers' Loan and Trust Co. to Joseph W. Stoner, receiver of the Pennsylvania Plate Glass Company, dated November 29, 1895, marked Plaintiff's Suppiemental Exhibit No. 1; a similar notice by the trust company to W. L. Kann, dated November 29th, 1895, marked Complainant's Supplemental Exhibit No. 3; and a similar notice to W. L. Kann, president Penn Plate Glass Company, dated November 29th, 1895, marked Complainant's Supplemental Exhibit No. 4.

(To which counsel for responding defendants object for irrelevancy.)

Counsel for complainant further offers a similar notice to Philip Semmer, president of the Pennsylvania Plate Glass Company, dated November 29, 1895, and marked Complainant's Supplemental Exhibit No. 2.

(To which counsel for responding defendants object on the ground of irrelevancy.)

Hearing here adjourned until Friday, September 16th, 1898, at 2 o'clock p. m.

133 And now, to wit, Friday, September 16th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., examiner.

Present: J. Scott Ferguson, Esq., of counsel for complainant; S. Schoyer, Jr., Esq., of counsel for responding defendants.

Counsel for complainants puts in evidence the deeds from the receiver to W. L. Kann, and from W. L. Kann to the Penn Plate Glass Company, as proven under the original bill.

Counsel for complainant also puts in evidence the mortgage upon which the original bill is founded.

Complainant rests.

Counsel for responding defendants object to all of the testimony taken on behalf of the complainant as irrelevant and incompetent, not meaning thereby to attack the sufficiency of proof or authenticity of papers as hereinbefore provided for.

Hearing here adjourned until Saturday, September 17, 1898, at 10 o'clock a. m.

*Defendants' Testimony Sur Supplemental Bill.*

And now, to wit, Saturday, September 17th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., examiner.

Present: J. Scott Ferguson, Esq., of counsel for complainant; S. Schoyer, Jr., Esq., of counsel for responding defendants.

Counsel for responding defendants respectfully asks counsel for the complainant to indicate of record upon what testimony
134 he relies to establish the responsibility or undertaking of responding defendants to take out and maintain policies of insurance on mortgaged property for the benefit of the trustee of said mortgage and of the bondholders secured thereby; and this for the purpose of regulating the testimony to be produced by the defendants.

Counsel for complainant answers the request by saying that he relies upon every averment of the supplemental bill so far as sustained by the testimony produced by him in support of those averments.

Counsel for responding defendants objects to the refusal of the counsel for complainant to comply with his request.

Counsel for responding defendants offer as bearing upon the question of costs the bond of Emanuel Wertheimer and W. L. Kann filed in the original bill July 24th, 1896.

Counsel for responding defendants also offer for the same purpose so much of the record of the supplemental bill as shows the number and names of insurance companies made codefendants, the service upon them by the marshal of the subpœna issued thereunder, and the appearance of counsel for said insurance companies.

Counsel for responding defendants also offer so much of the bill as relates to relief for the purpose of showing that no relief is sought against the insurance companies so made codefendants.

Counsel for responding defendants also offer the guaranty of J. G. Beamer and his written request to the plaintiff to institute the proceedings which have been instituted under the original bill and embraced in the testimony taken by the complainant under the original bill.

Counsel for responding defendants also offer so much of the pleadings under the original bill as relates to the invalidity of the mortgage lien so far as affects the rights of J. G. Beamer as holder of bonds to participate and be protected by the mortgage or the foreclosure of the same, on the ground that he was not an inno-
135 cent holder without notice; and this for the purpose of showing the issues presented and included in the acceptance by the complainant through his replication.

Counsel for responding defendants offer in evidence the undertaking of Emanuel Wertheimer filed in this cause that he is the holder of one hundred and sixty bonds of the total issue, and as such filed a stipulation in the said court under this bill in relation to the disposition and rights arising to him as such holder; and also the acknowledgment of the Farmers' Deposit National Bank of Pittsburg

filed in this case, that the said one hundred and sixty bonds had been deposited with the bank by the said Emanuel Wertheimer for the purposes set out in said acknowledgement.

Counsel for responding defendants state that all the foregoing offers are made for the purpose of establishing the proposition that the plaintiff is responsible for the costs incurred and which may be incurred in the matter of this supplemental bill.

Counsel for complainant object to the offers as not in any sense testimony to be taken before the examiner, and as therefore unnecessarily cumbering the record; and further object that the offers are irrelevant for the purpose stated; that the court having already overruled the demurrer to the bill and papers so referred to being on file in the case, many of them actually passed upon by the court, the offer is unnecessary, even if it did tend to sustain the purpose; further, that the ownership of the bonds by Wertheimer is expressly denied, and the allegation of complainant is that the bonds have actually been paid, and the right of the complainant to assert that fact is expressly reserved in the decree appointing a receiver for the insurance money.

Counsel for responding defendants offer the exemplified copy of the bill and proceedings in the case of George Cowen, R. H. Casey and Nathan Hutkoff *vs.* The Penna. Plate Glass Company, in the court of common pleas of Westmoreland county, No. 265 in
136 equity; especially that portion of the order and decree of the court for the sale of said property as follows: "Property to be sold subject to the lien of the first mortgage of $250,000 to secure the payment of bonds which said mortgage is recorded in Westmoreland county in Mortgage Book 43, page 1," the same being Defendants' Exhibit No. 110 under the original bill, and now marked Defendants' Exhibit 110, supplemental.

Counsel for responding defendants also offer in evidence the deed of Joseph W. Stoner to William L. Kann, dated the 2nd day of July, 1894, duly acknowledged and recorded November 26th, 1894, in the recorder's office of Westmoreland county, Pa., in Deed Book 235, page 257; especially that part thereof which recites the institution of the bill in equity No. 265 equity docket, on the 19th of March, 1894, the appointment of the said Joseph W. Stoner as receiver, and the order of the court directing the said receiver to expose the real estate, buildings and machinery, together comprising the plant of the Pennsylvania Plate Glass Company, to public sale; and the allegation that, on the 18th day of June, 1894, in pursuance of the said order, he did offer the said premises for sale, and the same were then and there sold to William L. Kann for the sum of $37,000, the property being sold as directed in said order of the court, subject to the lien of the first mortgage of $250,000, with interest thereon; and also so much of the same as recites the conveyance is accepted by the said grantee, W. L. Kann, subjected to the mortgage, being the mortgage aforesaid,—the said exhibit having been heretofore offered in evidence under the original bill as Defendants' Exhibit 111, and is now marked Defendants' Exhibit No. 111, supplemental.

Counsel for responding defendants also offer in evidence the ex-

emplified copy of the deed of William L. Kann and wife to the Penn Plate Glass Co., dated the 1st day of July, 1895, and recorded in the recorder's office of Westmoreland county in Deed Book 250, page 37, especially that part of the said deed which says that the
137 above-described property is now conveyed to the said party of the first part and is accepted by the party of the second part subject to a mortgage, being the mortgage hereinbefore referred to, the said copy of deed being heretofore offered in evidence as Defendants' Exhibit 112, and is now marked as Defendants' Exhibit No. 112, supplemental.

Counsel for responding defendants also offer in evidence an exemplification of record at No. 270 of the equity docket of Westmoreland county, Pa., in which A. C. Boyd is plaintiff and Philip Semmer and George Cowen are defendants, especially the answer of Philip Semmer and Exhibit "A" annexed to the bill, the same being an admitted copy of the partnership articles entered into the 19th day of June, 1890, between A. C. Boyd, of Duquesne, Allegheny county, Pa., and Philip Semmer, of the city, county and State of New York, witnessed by A. Livingstone Norman, and in connection therewith the testimony of Philip Semmer and George Cowen to the effect that the said George Cowen was interested to the extent of one-half of Philip Semmer's interest in the said partnership, said exhibit having been offered under the original bill as Defendants' Exhibit 109, and is now marked Defendants' Exhibit 109, supplemental.

(Objected to by counsel for complainant as incompetent and irrelevant.)

Counsel for responding defendants offer in evidence the record of the suit at law for damages brought by Philip Semmer and George Cowen against W. L. Kann at No. 977 May term, 1894, of the common pleas of Westmoreland county, and so much of the affidavit of claim sworn to by the said Philip Semmer as relates to the alleged arrangement by which Mr. Kann became the treasurer of the Pennsylvania Plate Glass Company and under which it was alleged he made advances and became entitled to certain securities, for the purpose of contradicting the evidence of Philip Semmer given in chief
138 as a witness for the complainant under this original bill; also the verdict and judgment in favor of the defendant in that cause, and also offer it generally.

(Objected to by counsel for complainant as incompetent and irrelevant, especially so far as offered for the purpose of contradicting Philip Semmer that the matters inquired about on cross-examination with a view of contradicting the answers of Semmer on such cross-examination was collateral matter and respondent is not entitled to contradict it.)

Counsel for responding defendants notes of record that the attention of Philip Semmer was directed on cross-examination to the allegations contained in his affidavit of claim in that case, and also to the verdict and judgment.

Counsel for responding defendants also offer the judgment of W. L. Kann against the Pennsylvania Plate Glass Company at No.

545 May term, 1894, of the court of common pleas of Westmoreland county for $10,000.

Counsel for responding defendants also offer the judgment entered in favor of W. L. Kann against the Pennsylvania Plate Glass Company at No. 267 equity docket of the court of common pleas of Westmoreland county for $32,500 and interest, on the 16th day of March, 1894, under a cautionary order of the court of common pleas of Westmoreland county aforesaid.

Counsel for responding defendants state that these offers are made for the purpose of establishing the existence of the debts under judicial recognition, and that the same have not been directly attacked or impeached.

Counsel for responding defendants also offer for the same purpose and in connection with the foregoing testimony the decision of the supreme court of Pennsylvania in the appeal of George Cowen, appellant, against The Pennsylvania Plate Glass Company, appellee, reported in full in vol. 184, Pa. St., commencing on page 1, to be followed by proof, if required, that the W. L. Kann therein
139 mentioned and the indebtedness claimed by him as represented by judgments is the defendant, Kann, in this cause, and the debts therein claimed in part the advances made to the Pennsylvania Plate Glass Company and covered by the two judgments aforesaid.

To which offer, as a whole and in detail, counsel for complainant object that it is in nowise responsive to the supplemental bill, and as irrelevant and incompetent.

Counsel for responding defendants offer so much of the testimony taken under the original bill as relates to the organization, holdings of stock of the Pennsylvania Plate Glass Company, its certificates and proceedings for the issue of bonds, the various holdings of stock from time to time, and the connection of J. G. Beemer with the said company, and the minutes and other matters showing or tending to show fraud in the organization of the company in the issuing of bonds, and J. G. Beemer's actual or imputed knowledge of the same.

Objected to by counsel for complainant for the following reasons:

First. That the proposed offer is wholly incompetent and irrelevant as testimony under the supplemental bill;

Second. That it is generally incompetent and irrelevant.

Counsel for complainant state that this objection is not intended to weaken the force of the agreement between counsel as to the use for any relevant purpose of any testimony taken under the original bill which may be indicated in this case.

Counsel for responding defendants offer in evidence the record of the proceedings under the original bill to meet the averments in the supplemental bill of alleged delays on the part of or interposed by responding defendants.

140 *Testimony of W. L. Kann.*

W. L. KANN, called on his own behalf and on behalf of the Penn Plate Glass Company, testified as follows:

Direct examination by Mr. SCHOYER:

Q. Mr. Kann, you are one of the defendants in this case?

A. Yes, sir.

Q. And also in the original bill?

A Yes, sir.

Q. And you are the same Mr. Kann who purchased the property, real estate and machinery constituting the plant of the Pennsylvania Plate Glass Company at the sale of Joseph W. Stoner, receiver, in 1894, under the order of the court of common pleas of Westmoreland county?

A. Yes, sir.

Q. You were at one time treasurer of the Pennsylvania Plate Glass Company?

A. Yes, sir.

Q. When were you elected?

A. I was the treasurer of the Pennsylvania Plate Glass Company and was elected on the 10th day of January, 1894, and remained in that position under protest after the 15th day of January until the company was put into the hands of a receiver.

Q. Under what arrangement did you accept that treasurership and with whom?

A. I really never had any arrangement as to the accepting of the treasurership. I did agree to become a director in the company, and on the day of the annual election of January the 10th, 1894, I was at the office of the plant of the Pennsylvania Plate Glass Company where the election was taking place, and Mr. George Cowen and Philip Semmer tried to induce me to accept the treasurership, and argued very strongly in favor of my accepting the position in consequence of an arrangement we had for the introduction of crushed steel into the plant, and for the purpose of giving me an opportunity of making the investigation which I was to make; and really before I knew that they had the thing under consideration they had had me elected as treasurer.

141 Q. Upon what representation and what were you to do? Tell us all about it as concisely as you can.

Counsel for complainant object to this line of testimony as incompetent and irrelevant; and on the ground that, so far as any testimony was given on part of complainant tending to show a specific arrangement by which Kann entered the Pennsylvania Plate Glass Company and became connected therewith officially, the testimony must be confined to a denial or affirmance of the complainant's testimony in that particular.

A. They had placed in my hands about that time and a few days previous to January 10th, a statement of their financial condition.

Q. For what period of time?

A. For the year of 1893, and particularly for the month of December of 1893, showing that the company had made during the month of December a profit of $25,000 and some odd hundred dollars.

Q. There was a balance-sheet or statement presented in evidence exhibited to Mr. Semmer on cross-examination and offered in evidence. Was that the statement?

A. Yes, sir; that is the same paper which I refer to; and that was the only paper or the only books or the only records of any kind which I ever seen up to that time, outside of the verbal statements made by Mr. Semmer and Mr. Cowen as to the flourishing condition that the company was in and its ability to make considerable money, outside of the fact that they were hard pressed for money. That was the only statement or records or books that I had.

Q. Was that statement of the financial condition true or untrue?

(Objected to by counsel for complainant for the reason that, if at all important, the books themselves are the best evidence.)

A. It was utterly false.

Q. When did you discover it to be false?

142 A. The first step that I took towards verifying or having that statement verified was a few days after my election when I went to the office of the company at Irwin and at the request of Mr. Semmer to the book-keeper in charge of the accounts and papers, I started to make an examination of the books and I found it was not true and correct.

Q. Had there been another balance-sheet?

A. I afterwards learned that there had been.

Q. When was it; afterwards?

A. Yes, sir; shortly afterwards.

Q. When did you first learn of the old balance-sheet?

A. Shortly after that time,—within probably a month or so. I had learned that there was another balance-sheet made immediately upon my examination of the books, but didn't know the facts and the details of it for probably two or three weeks or a month.

Q. What did that original balance-sheet show?

(Objected to by counsel for complainant as incompetent and irrelevant.)

A. It showed that the company had never made any money since it was in operation, and that they had made a loss during the year of 1892–'3 of over $119,000.

Q. And the balance-sheet or statement which was shown to you failed to disclose that?

A. Yes, sir; to the contrary showed a profit.

Q. How was that loss apparently overcome, as you afterwards discovered?

A. I discovered that they overcame, or apparently overcame, that deficit and loss by the surrender of the capital stock, or some of it

which was in the hands of George Cowen, Philip Semmer and I believe A. C. Boyd.

Q. To an equivalen amount of the loss?

A. Yes, sir; to an equivalent amount of the loss shown by the books.

Q. And that surrender of stock was made to appear as a wiping out of that loss?

A. Yes, sir; showing then a net profit of $25,000; and I also learned that after that stock had been so surrendered, by
143 some means or other not explained even to this day, that same stock found its way back into the hands of Philip Semmer and George Cowen.

(Objected to by counsel for complainant as hearsay on the face of the answer.)

Q. What did you do after that, if anything, in the way of advancing money, and under what arrangement did you make the advancements?

A. The only arrangements I ever had to advance any money was after I became or took the position of treasurer; immediately following that day I found they were in pressing need of money, labor claims pressing them, threatened strike of their emp'oyees and a general state of lacking financially; and upon the earnest request and solicitation and pressure brought by Mr. Cowen and Semmer I agreed to advance them money temporarily provided they would give me judgment notes.

Q. Mr. Philip Semmer was president?

A. Yes, sir.

Q. And what position did Cowen hold?

A. George Cowen was the treasurer up to the 10th day of January, and I think after that date was elected vice-president and director.

Q. Was that arrangement perfected, or was it followed by anything done by the company to protect you?

A. There was an executive committee called of the Pennsylvania Plate Glass Company on the 15th day of January, 1894, at which they agreed if I would advance any money they would give me these judgment notes, and they did.

Q. What did they do?

A. They did on the day at that meeting, after passing the resolution in my presence, give me one judgment note of $10,000, which was equivalent to about the money that they wanted that day and I had advanced, and handed me two judgment notes attested by the secretary, Mr. Joseph W. Stoner, with the understanding and agreement made that I should hold these two notes, and after the further amounts which I would advance would come into their hands, these notes should be filled out for the amounts.

144 Q. The object of these notes was what?

A. To protect me on the advances that I made them.

Q. By way of preference?

A. Yes.

Q. What was the whole amount of money which you had advanced?

A. I advanced from that day up to the end of my advancements $38,500.

Q. That was in addition to the $10,000?

A. No, sir.

Q. What was the aggregate then?

A. $38,500 on this agreement, and I had discounted a note for the Pennsylvania Plate Glass Company prior to my election as treasurer for $3,500.

Q. Which was included in the $10,000?

A. No; but which they agreed should be a portion of this guaranty.

Q. What did you discover about those two blank judgment notes?

A. When I found that they were getting hopelessly into distress and that they didn't accomplish what they said to me they had under way—that was the selling of a third interest in their company to some other parties for a large sum of money out of which they intended to repay me the money that I had advanced—when I found that they had no other means of paying me, and when I found that they, after having made repeated calls on the board of directors to convene and devise some means to overcome their financial distress, that they had sold all available glass in the factory to one Nathan Hutkoff, I then made a demand on the same day that they made that sale, which was the 14th day of March, 1894, for the repayment of the money; they discussed the matter at that meeting and didn't appear to have any means at their command to repay me, even after I had made the proposition to them at the meeting that I would give them all the time that they needed indefinitely—two or three years if it was necessary—if they would secure the money with six per cent. interest; and after they adjourned that meeting to be called the next day at 10
145 o'clock with the view of coming to Pittsburg and having the necessary papers executed to go into the hands of a receiver, and after that meeting of the next day was not convened, I then made a demand on Mr. Semmer as president of the company, to sign those notes and fill in the amounts for the amount which I had advanced or to pay me the money; he refused to do it. I then entered up the one note which was completed for $10,000, and the next day, on the 16th, I think, of March, or the 17th, they went into the hands of a receiver—the 19th of March—went into the hands of a receiver.

Q. Did you obtain judgment for the rest of your claim?

A. Yes, sir.

Q. Under a decree of the court of Westmoreland county for a cautionary judgment?

A. Yes, sir.

Q. Was it entered?

A. Yes, sir.

Q. As of what date?

A. As of the 16th day of March, 1894.

Q. Your unpaid judgments or debts came before the auditor, did they not, to audit the moneys accounted for by the receiver?

A. Yes, sir.

Q. Did Mr. Semmer appear there?

A. Yes, sir; by counsel.

Q. Was any objection made to your claim on the ground of a violation of contract, or that it wasn't owing?

A. No, sir; there never was any such objection made, either by Mr. Semmer or his counsel.

Q. At the receiver's sale you were present, of course?

A. Yes, sir; and at the adjourned sale, too.

Q. Had you seen the order of sale?

A. Yes, sir; saw it, read it and heard it read at the sale.

Q. It was read at the sale?

A. Yes, sir.

Q. Was any other order read at the sale?

A. No, sir.

Q. Was any other notice given at the sale?

A. No, sir; there was no other notice given or read at the sale affecting the sale.

146 Q. And you bid on the property?

A. Yes, sir; I did.

Q. $37,000?

A. My final bid was $37,500, and the property was knocked down to me.

Q. At that sale were many present?

A. Yes; there were quite a good many people there.

Q. Were there other bidders?

A. Yes; I know of one bidder—Mr. Beamer. His first bid was $25,000.

Q. You have heard Mr. Philip Semmer's testimony-in-chief in this case?

A. Yes, sir.

Q. And you recall his statements about the arrangement made between you which he says were made between you and him?

A. Yes, sir.

Q. In regard to your becoming connected with the company and advancing moneys and how you were to be secured?

A. Yes, sir; I heard his statement.

Q. Is that statement true or false?

A. False.

Q. Is it or is it not true that you ever agreed to advance $100,000 for the benefit of that company?

A. It is totally false that I ever agreed to advance any sums of money up to the time that the executive board of that company passed the resolution that if I would advance money that they would give me judgment notes.

Q. Is it or is it not true that you ever agreed to advance any definite sum of money?

A. To the contrary I stated in plain language to Mr. Semmer and

to Mr. Cowen when they finally did elect me treasurer that I would have nothing at all to do with the financial arrangements of that company or be responsible for any of their finances or go on their paper, or anything whatsoever, until I would be able to acquaint myself with their condition, and if at the end of that time I saw that their statements and representations to me were true, that I would accept their proposition and then would identify myself with the company, and if it would be desirable at the time, take charge of its finances.

Q. Is it true or untrue that you made preliminarily any ar-
147 rangement with Philip Semmer for advancing money to the Pennsylvania Plate Glass Company upon the arrangement that you were to have a third of the holdings of the common stock of George Cowen, Philip Semmer and A. C. Boyd?

A. It is positively untrue. I never did make any such or any other arrangements.

Q. Did you ever receive any stock or shares of stock under any such alleged arrangement?

A. No, sir; I never received but one share of stock under any arrangement that we had.

Q. Is it true or untrue that the judgments which you were to receive were to be held by you in trust equally for the protection of yourself and Philip Semmer?

A. It is untrue. The judgment was to be given for my own and sole protection.

Q. Under the arrangement for the giving of the judgments, state whether there was any qualification whatever upon your right to use them as to being for the benefit of other people or as to the time when they were to be used?

A. Nothing whatever but what was contained in that resolution; no agreement outside of that.

Q. What was the condition of the company on the first of January, 1894, from your acquaintance with it?

A. They were hopelessly and totally insolvent.

Q. How long had they been so?

A. Ever since the first day of its organization.

Q. Did they ever have any working capital?

A. Not a cent.

Q. How were the works built; upon what fund?

(Objected to by counsel for complainant as incompetent and irrelevant.)

A. The works were built upon the funds which they derived from the sale of the stock and bonds that they issued.

Q. The stock books appear to show that certificates of common stock and some preferred stock which had formerly been held by Philip Semmer and George Cowen had passed to you. I wish you would explain that transaction.

148 A. After I had advanced and during the time that I was advancing this $38,000, their demands and requests to me were daily for more money, and I realized that even their judg-

ment notes would not be very good security for a very large amount or anything more than that, and being in the position that I was, having advanced the amount that I did, seeing no way of getting it back only by executing the judgments which I did not want to do if there was any other means of securing the money, I finally agreed that if an arrangement could be made by which I could safely advance the amount of money which they required to put them into condition, that I would entertain it. As a result of that, Mr. Cowen of New York came on and we, with Mr. Semmer, went to your office, Mr. Schoyer, on Fourth avenue, and they presented their case; made a statement of their condition, and you advised that, so far as you could see, that nothing short of——

(Objected to by counsel for complainant as incompetent and irrelevant, and not in response to any testimony given by the complainant in chief under the supplemental bill.

(A. continued)—$75,000 would put them into shape, and as a matter of policy advised me that if I had the money or could raise it that it would be probably the best thing under the circumstances to advance them up to the $75,000, including the money that I had advanced, providing they would give me sufficient security; and as a result of that you blocked out a proposition that day which was submitted to them, a portion of which they agreed to and a portion they excepted to, and finally you drew up the agreements which were offered here presented to Mr. Semmer on cross-examination and offered in evidence, which was to the effect that their joint holding of common and preferred stock should be divided in thirds, that stock should be hypothecated which was the controlling interest of the company with the Safety Deposit Company of Pittsburg, and I would advance them upon that arrangement,
149 coupled with the preferred stock, under the privilege of their redeeming the same any time within five years, the balance of the $75,000. They were to receive the benefits derived from the stock in the way of dividends, but I, in the meantime, was to have, as long as they did not redeem the debt, the control of the stock so far as its voting. Mr. Cowen, after having the papers presented to him, wrote me a letter——

(Counsel for complainant object to the witness stating the contents of any letter without the production thereof; and further object that the entire subject-matter about which the witness is now testifying is not in response to the testimony given in chief by the complainant, and not in response to any proper cross-examination.)

(Counsel for responding defendants says that the testimony objected to, which will be followed, is for the purpose of contradicting the testimony of the complainant's witness, Philip Semmer, in this cause.)

(A. continued)—and accepted the agreement, and in consequence of that letter, a date was fixed in Pittsburg to close the arrangements. In order to carry out our understanding for that meeting which was arranged, I had the Pennsylvania Plate Glass Company,

through Mr. Semmer, get out these certificates which were presented here the other day, which were to be a portion of this arrangement; the certificates were gotten ready and Mr. Cowen signed it, or rather endorsed it in blank, for the purpose of carrying out the agreement; Mr. Semmer refused to up to that time; I never had any of the certificates in my possession; and that is how they happened to be issued.

Q. The arrangement fell through?

A. Yes, sir.

Q. It wasn't perfected by Cowen and Semmer?

A. No, sir.

Q. What became of the stock?

A. It is amongst the papers of the company as a portion of their records.

Q. Do you hold it for yourself or for them?

A. I just hold it for them; it was an incomplete arrangement.

150 Q. Was there any arrangement of any kind or description other than what you have mentioned by which the stock was to come into your hands other than the one share which qualifies you as director?

A. No, sir.

Q. And the statements of Mr. Semmer on that subject are true or untrue?

A. They are totally false; and if you will allow me, you will note that the date on those certificates bear the date of February, 1891, corresponding date to the arrangement; and Mr. Semmer's statement is that this stock was given to me ahead of the other arrangement.

Q. At the time you purchased the property at receiver's sale, I wish you would state whether or not it was purchased for the Penn Plate Glass Company or for whom it was purchased?

A. It was purchased solely on my own account and for my own use, and I did that as the only way I could see of saving myself and probably making my debt good; and at the time that I bought the property I had no idea—no definite idea—as to what I would do with it. I had no contemplation then of ever operating the plant or ever forming the Penn Plate Glass Company.

Q. And no definite plans or of any thoughts in your mind at that time about what you were to do?

A. None whatever. In fact, I offered the plant back to the Pennsylvania Plate Glass Company at their stockholders' meetings which they had—or rather, I offered them my possession if they would pay me or secure me the money; that I didn't want to take any further actions; or rather, all I requested them to do was to pay the money with interest that they owed me.

Q. Did you offer them any time?

A. I offered them all the time they wanted; gave them their own conditions as to time—all I asked was security.

Q. And was that proposition accepted?

A. They had several meetings at which I was present and — which

they talked it, and it was never accepted, and they never
151 made me any tangible proposition. At that time I was engaged in various other pursuits and I had no time or intention to go into the plate-glass business.

Q. Having purchased it you continued to hold it for how long?

A. About a year.

Q. Did you make improvements?

A. Yes. I found that the plant was in such bad shape and such an unfinished condition that——

(Objected to by counsel for complainant as incompetent and irrelevant.)

(A. continued)—in order to get my money out of it at all I had to either put it into condition or in such shape as I might be able to sell it, or, if I was compelled to, operate it.

Q. Mr. Semmer was examined in chief about insurance; you heard his testimony on that subject?

A. Yes, sir.

Q. What do you know about the insurance before the Pennsylvania Plate Glass Co. receiver was appointed, and the insurance taken out by the receiver?

A. Among the first things I learned from my investigation——

(Objected to by counsel for complainant,—first, unless the witness testifies of his own knowledge and not from hearsay; and second, that the insurance papers themselves ought to be produced.)

(A. continued)—right at the outstart was that they had very little or no insurance, and the companies that they were in were of a very poor class. I advised them as soon as I *became* advancing them any money, that it would be necessary for them to get sufficient protection in the way of insurance. They did at once try to get insurance, and along starting with the months of January and February, they took out insurance up to the extent of about $300,000. I think they had less than $140,000 in January. When the receiver took charge of the property, this new insurance, which the Pennsylvania Plate Glass Company had taken out was not paid for
152 and the agents of the companies and the companies themselves threatened to cancel the policies unless the premiums were paid. The receiver went into court of his own accord and asked the privilege of issuing certificates in order to keep this insurance intact, and the court granted him that privilege. When the receiver turned the property over to me under the sale, more or less of this insurance was still in force; quite a good deal of it had been cancelled from the fact of the company getting into litigation and into receiver's hands. The portion which was intact I believe the receiver let stand and it expired of its own accord. The insurance that I put on immediately upon getting the deed of the property I took out in my own name and for my own benefit. After the property was sold by me to the Penn Plate Glass Company that was finally organized July, 1895, the Penn Plate Glass Company took out insurance in its own name for its own benefit exclusively, and

in the form of the policies issued the clause appears in which attention is particularly called to the fact that there is a mortgage on the property of $250,000, but the insurance effected is not to apply to this mortgage, and is not for their benefit, but for the sole and exclusive benefit of the Penn Plate Glass Company.

Q. I now hand to you a copy of the clause referred to and ask you whether the same appears in all the policies taken out by the Penn Plate Glass Company and which were in force from that time until the filing of the supplemental bill in this cause, and whether that is the provision which you have testified to?

(Objected to by counsel for complainant, for the reason that the proposed evidence is incompetent to affect the rights of complainant under the supplemental bill.)

A. It is.

The paper referred to offered in evidence by counsel for responding defendants, and marked Defendants' Supplemental Exhibit No. 7.

153 (Objection renewed by counsel for complainant.)

Q. The provision was understood and agreed to by the insurance companies?

A. Yes, sir; quite a number of them asked explanation in regard to it.

Q. It is alleged that your procedure as a judgment creditor, and in other ways as a creditor, precipitated the insolvency of this company and caused the appointment of the receiver, as stated by Mr. Semmer in his testimony-in-chief. Is that true or untrue?

A. That is untrue; as I learned a few days after my becoming treasurer that had they not received the advances which I made them, they would either have gone into the hands of a receiver or other actions would have taken place against them; and to the contrary, my advances of money kept them agoing as long as it did, and there is no question if they lived up to the agreements which were understood, for the company ever having to go into the hands of a receiver, as I was willing to advance them money for the benefit of the company upon the written agreements referred to which are now in evidence, if they had been executed.

Q. I wish you would state whether, directly or indirectly, Mr. Kann, you ever said, did or agreed, or the Penn Plate Glass Company of which you are president, ever asked, did or agreed or said anything that either you or the said company would insure for the benefit of the complainant in this case as a bondholder secured by the said mortgage.

A. No, sir; there never was any promise or agreement or anything that could be construed as such, by either myself while I owned the property, or as president of the Penn Plate Glass Company afterwards.

Q. You may state whether or not you had not distinctly refused before this bill was filed, both you and the Penn Plate Glass Com-

pany, to take and maintain insurance for the benefit of the plaintiff or for the bondholders secured thereunder.

A. Yes, sir.

Hearing here adjourned until Monday, September 19th, 1898, at 3 o'clock p. m.

154 And now, to wit: Monday, September 19th, 1898, met pursuant to adjournment at the office of H. D. Gamble, Esq., examiner.

Present: J. Scott Ferguson, Esq., of counsel for complainant; S. Schoyer, Jr., Esq., S. B. Schoyer, Esq., of counsel for responding defendants.

W. L. KANN recalled.

Cross-examination by Mr. FERGUSON:

Q. Mr. Kann, when did you advance the first money under the $10,000 judgment note?

(Objected to by counsel for responding defendants for the reason that the advances are now merged into judgments.)

A. My answer to that was that I can't tell the dates. It was around the time the judgment was given. I could give the exact dates if it was necessary.

Q. Can you tell us when you advanced the next money after the execution of the judgment note of $10,000?

A. No; I couldn't tell you that without referring to my books.

Q. Could you tell us the amount of that advance?

A. In dollars?

Q. Yes.

A. No, sir; I couldn't.

Q. Do I understand you that on the day the $10,000 judgment note was executed you got some blank judgment notes attested by the secretary?

A. Yes, sir.

Q. How many did you say you got?

A. I got two besides the one that was filled up.

Q. Two in addition to the $10,000?

A. Yes, sir.

Q. Before any question arose as to the preparation of papers by Mr. Schoyer, or rather, before you came into contact with him in relation to the matter, and after you got the judgment notes, had you advanced any money, and, if so, how much?

155 A. Yes, I advanced money from along the 15th day of January, I think, when the first moneys were advanced, or about that date, up to within probably the very day that I saw Mr. Schoyer in connection with Mr. Cowen and Mr. Semmer.

Q. How much money did you advance after Mr. Semmer refused to execute the agreements which Mr. Schoyer prepared?

A. None.

Q. When was it that you asked Mr. Semmer to execute the two judgment notes on behalf of the company first?

A. I did ask him several times prior to the 14th day of March, but didn't put any particular stress upon him doing so. I supposed he would do it wherever required. He promised to fill them up; the notes were in my office; he promised to come out and fill up one, which I asked him to do for the amount which was advanced up to that time, but never did it. I asked him to fill up both of them for the amount over the $10,000 on the 15th day of March.

Q. That was the first time you asked him in reference to that?

A. No; it *it* was the only time I asked him to fill up the whole amount; I had asked him to fill up one of them before.

Q. What reason did he give for refusing to sign these notes?

A. He simply wouldn't do it; said he couldn't, and wouldn't and didn't. I told him that he had no choice in the matter—it was simply a clerical act which he had no right to refuse; didn't think that it laid with him to say anything more about it; but he simply wouldn't do it.

Q. Didn't he claim that you were only to get a third of the stock that he and Cowen and his associates held at the time of these requests, and that you had got that?

A. No, sir; he never made a reference to that stock at any such times.

Q. When did the two certificates made out in your name, one for fifty shares of preferred and the other for eight hundred and
156 twenty-two shares, I believe, of common stock, come into your possession?

A. They really never were in my possession.

Q. On the 21st of February, 1894, the certificate books as well as the other books of the Pennsylvania Plate Glass Company were at its office at Irwin, weren't they?

A. I think not.

Q. Where were they?

A. I think that Mr. Semmer or Mr. Cowen or both of them had those books sent to 717 Grant street, my office, for the purpose of executing this agreement, having the books there for the purpose of making out those certificates.

By Mr. SCHOYER:

Q. What agreements?

A. The agreements which were referred to here the other day—the Schoyer agreements.

By Mr. FERGUSON:

Q. In whose handwriting are the certificates, except the signatures?

A. I think that the handwriting of those certificates are in—I think they were made out by W. T. McClaren, the book-keeper or clerk that I had at the time.

Q. At your place of business?

A. At my office; yes, sir.

Q. As a matter of fact, the $10,000 judgment was entered before the petition was filed for the receivership, wasn't it?

A. Yes.

Q. And that petition was filed by Cowen, Casey and Hutkuff immediately after the entry of your judgment within a day or so?

A. Yes, sir.

Q. When the receiver applied for the order to sell the plant, you were familiar with the terms of the order, were you not?

A. Not when he applied; I became familiar with the order afterwards.

Q. And before you bought, you familiarized yourself, did you?

A. Yes.

Q. And you were also familiar with the terms of the mortgage itself and the bonds, were you not?

A. Of what mortgage do you refer to?

157 Q. The $250,000 mortgage?

A. Yes.

Q. You say that Beamer was one of the bidders at the sale?

A. Yes, sir.

Q. Were there any other bidders who bid higher than the $25,000 except yourself?

A. Yes.

Q. Who were they?

A. I don't know.

Q. They were strangers to you?

A. Yes.

Q. And strangers to the Pennsylvania Plate Glass Company so far as you know?

A. That I don't know.

Q. So far as you knew?

A. Yes.

Q. You had no knowledge of them that would connect them in any way with that company?

A. No positive knowledge; had an idea that they were connected, or rather, parties that were connected with the company.

Q. What was the next lower bid after yours?

A. $37,000 I believe.

Q. And yours was $37,500?

A. Yes, sir; that is the best of my recollection; I followed the bids up.

Q. Mr. Kann, how soon after you purchased at the receiver's sale did you take possession of the property?

A. As soon as I got the deed.

Q. About how long was that?

A. That I can't tell.

Q. I mean actual possession, not legal possession?

A. As soon as I got the deed, and that must have been a month or so after the sale, or six weeks—something like that.

Q. And how soon after that was it that you conceived the project of organizing another corporation to operate the plant?

A. Not until the following year.

Q. How early in the following year?

A. The best of my recollection, probably along in March or April. I had negotiations pending for a long time to sell it, and I didn't attempt to organize the company until I found I couldn't.

Q. When were you first called upon by the Farmers' Loan & Trust Company to insure this property?

A. I don't remember that.

158 Q. I showed you the other day demands purporting to be made in November, 1895. Was that the first time or was it earlier than that?

A. I think that was the first time, and I think that was the only time that I recollect of.

Q. I asked you the other day to see if you had the reference to a letter dated the 16th of October, 1895, addressed to Hays & Noble. Did you find that letter?

A. Yes; I have found that letter—that is, I found the letter-press of it.

Q. Hays & Noble were acting for whom at that time, if you know?

(Counsel for responding defendants object to the question and call upon counsel for complainant to state what they propose to prove by this line of examination.)

Counsel for complainant state that they propose to show by the witness that as early as October 16th, 1895, he or the Penn Plate Glass Company had been called upon to insure the property; that they were negotiating at that time, and that he offered to insure on certain conditions which were contrary to the terms of the mortgage.

By Mr. SCHOYER: Offered to whom?

By Mr. FERGUSON: Offered to the bondholders.

By Mr. SCHOYER: What bondholders, and through whom?

By Mr. FERGUSON: The letter will show for itself. Offered to carry $250,000 insurance for the benefit of the bondholders if the bonds were made to run for ten years from January, 1896, instead of five, and the rate of interest was reduced from six per cent. to five per cent. per annum.

(Objected to by counsel for responding defendants as irrelevant, incompetent, not cross-examination and properly a matter for the plaintiff's testimony-in-chief if it were relevant; that upon its face it purports to bring into the case a correspondence, not with the complainant, but with a firm of attorneys named Hays & Noble, and also bring in part only of the matters referred to in that

159 letter; and counsel instructs the witness not to answer that or any other question connected with this alleged correspondence.)

(Question read as follows:)

Q. Hays & Noble were acting for whom at that time if you know?

A. Under advice of counsel, I refuse to answer.

Q. I show to you, Mr. Kann, paper marked Complainant's Supple-

mental Exhibit No. 5, and ask you whether or not you have the letter-press copy of that letter with you?

A. Yes, sir.

Q. I will ask you to look at the Complainant's Supplemental Exhibit No. 5 and state whether or not that is a correct transcript of the letter which you mailed as shown by your letter-press book?

Counsel for the responding defendants make the same instruction; and further object that it is not the original letter; and that it is not cross-examination.

A. Under advice of counsel I refuse to answer.

Q. Mr. Kann, you have stated that there was no mention in any of the transactions between you and Semmer and Cowen of $100,000 or thereabouts as the sum which you were to advance to put the Pennsylvania Plate Glass Company on a going basis. What was the sum named, if any?

A. There never was any sum named.

Q. Was there any sum indicated as probably necessary, whether you agreed to advance the sum so indicated or not?

A. There was never any sum named as between us that I should advance.

Q. Did they tell you what they thought would be necessary?

A. No, sir.

Q. Had you known Semmer before the endorsement of this note which you say preceded the $10,000 judgment note?

A. The endorsement of what note?

Q. I understood you to say that you endorsed a note for
160 the Pennsylvania Plate Glass Company—or discount I believe was the expression. Had you known Semmer before that?

A. But a very short time.

Q. Had you known Cowen?

A. Never had met Mr. Cowen.

Q. Had you known anything of the business of the Pennsylvania Plate Glass Company?

A. Only generally that there was such a concern.

Q. The amount of that note was $3,500 I believe you stated?

A. Yes, sir.

Q. And you had for that then the glass company itself and the endorsements of Cowen and Semmer?

A. No, sir.

Q. How was that?

A. The paper was a note of the company made payable, I believe, to themselves, endorsed, if my recollection serves me right, by Cowen and Hutkoff, Casey and Semmer.

Q. Then your next advance was how much?

A. I don't know the exact amount, Mr. Ferguson.

Q. At all events, as early as the date of the first judgment note you had discounted the note and had advanced $10,000?

A. I think so; yes, sir.

Q. Now, didn't you make any examination of the books of the company before you made any further advances?

A. I made an examination of the books between the 10th and the 15th—what little examination I made—it was very brief, was between the 10th and the 15th, and on the strength of that examination I refused to advance them any money or become in anywise liable and have anything to do with their finances, and offered them my resignation as treasurer; and the outcome of the whole thing was that they agreed that if I would advance them money until they could raise money from a source they asserted they could, they agreed they would give me judgment notes for what money I would advance.

Q. And that is the minute produced here and signed by Stoner and Semmer?

A. Yes, sir.

161 Q. Who took possession of that agreement?

A. That was a part of the records of the company. I guess Mr. Stoner as secretary had it.

Q. Now, then, it was after that that you went to see Mr. Schoyer?

A. Yes, sir.

Q. And the agreement that you wanted Mr. Schoyer to prepare and that Mr. Schoyer did prepare was a different agreement than the one represented as made by that minute, was it?

A. Entirely.

Q. Did that minute correctly represent the arrangement that you had made? In other words, was it drawn and signed by the parties and submitted to you at the time it purports to be dated?

A. Yes, sir.

Q. And it was satisfactory to you at that time?

A. Yes, sir.

Q. There was nothing said at that meeting about preferred stock and a guaranty of Semmer and Cowen, was there?

A. Positively not one word. Mr. Stoner was there at that meeting as well as Mr. Semmer.

Q. Well, did you undertake to go into this company which you knew required the advancement of a considerable amount of money, upon its judgment note alone?

Counsel for responding defendants object to the form of the question as assuming that at the time he went into the company he knew it would require any money to be advanced by him. On the contrary, the witness in his examination-in-chief stated the direct reverse.

Q. Mr. Kann, what did you take the share of stock for,—to qualify yourself didn't you?

A. Yes, sir; as a director.

Q. And why were you to become a director?

A. I had some negotiations with Mr. Semmer and Mr. Cowen pending towards the introduction of material which I was interested in for the grinding of glass which I considered valuable for that industry; he thought it was valuable and wanted to acquire

162 the exclusive use of it; and in order to give me some authority as to its introduction into the works, in order to

be able to familiarize myself as to its use—in other words, that share of stock was issued to me and I was to become a director of the company. If the demonstration proved successful, we were then to enter into negotiations for a different arrangement as to how it should be sold to the company and further develop it.

Q. And there was no other stock to be given to you at all?

A. No, sir. Mr. Semmer had talked to me a number of times about my buying stock and preferred stock—wanted me to try to induce my friends to buy it; wanted me to help him place it and all that sort of thing, but I never agreed to do anything in regard to his stock; never agreed to buy any of it; never had anything at all to do with the placing of any of it.

Q. As I understand you, you did agree to advance money on the terms indicated in the minute signed by Cowen, Semmer and Stoner, given in evidence on your side. What agreement, if any, was made as to when the money was to be repaid?

A. I told Mr. Semmer distinctly that I would take those notes for my own protection and use them whenever it would be necessary to do so. I only advanced that money to them under the hardest kind of pressure; they had a pay-roll coming due; a threatened strike; and the wall falling in on them. I didn't want to advance the money, and if my name hadn't been identified with the company, I wouldn't have advanced them any on their judgment note or anything else.

Q. As a matter of fact, you did advance it, and you advanced it not to Semmer, Cowen or Stoner, but you advanced it to the corporation?

A. Yes, sir.

Q. Did you ever make any demand upon the corporation in any way for the payment of even that $10,000 except by entering it up and issuing an execution on it?

A. Yes, sir.

Q. How did you do it?

A. I repeatedly made personal demands on the members of the company.

163 Q. What members?

A. On the president, on Mr. Cowen, who was supposed to be the financial back of the company, and on Mr. Stoner, as the secretary; and on the 14th day of March, 1894, I made a written demand upon Mr. Semmer, as president of the Pennsylvania Plate Glass Company, as a corporation, and upon Mr. Stoner as its secretary.

Q. Was there ever any meeting of the directors at which you made such a demand?

A. On that day, yes, sir; I have a copy of that demand and the service, as it was served by somebody else beside myself.

Q. On what day?

A. On the 14th day of March, 1894. It was at the meeting, Mr. Ferguson, that was called for the very purpose of taking some steps to raise funds to pay me and keep the company going that I made the demand.

Q. And that was on what day you say?

A. On the 14th day of March, 1894, the demand was made by Mr. Abram Israel. When I made that demand on the 14th day of March, 1894, or rather when the demand was made for that money, I was at the meeting, and I then and there made the statement to the directors that were convened that if they could not pay me that money or take means to secure it, I would let them have their own time to pay it—one, two or three years or longer if necessary; but I either wanted the money or wanted absolute security; and they promised to try to raise the money that day. They adjourned that meeting until the next day for the purpose, or at least they led me to believe that was the purpose; they stated to me that they had a party who was interested in the company—a party in New York by the name of Olcott, a very wealthy man who they thought would advance the money and take my claims.

Q. When was that statement made—on the 14th or 15th?

A. On the 14th and on the 15th, as well. On the 15th.

164 Mr. George Cowen, when he failed to come to the meeting that was adjourned from the day before made as an excuse that he wanted to go back to New York for the purpose of raising this money.

Q. Do you remember what day of the week that meeting was held on?

A. I do not now; no, sir.

Defendant rests.
Plaintiff rests.
Testimony closed.

165 *Opinion.*

BUFFINGTON, *J.:*

As we view it the decision of the original case depends on the answer to two questions; first, has the trustee shown a right under the mortgage to foreclose; and secondly, if so, can W. L. Kann or the Penn Plate Glass Company, later successive purchasers of the mortgaged premises, question the validity of the mortgage.

From the very nature of a pledge or mortgage of property, a right to foreclose or sell the pledge arises *ex necessitate* and without express grant of such power upon default. "Such right of mortgage foreclosure," says Mr. Justice Matthews in Chicago, etc., R. R. Co. *vs.* Fosdick, 106 U. S., 47, "follows from the nature of the security, and arises upon its face, unless restrained by its terms." When, then, the right of a mortgagee or pledgee to dispose of the pledge is denied a limitation or exception abridging such right should be shown, and such limitation, being in derogation of an inherent, essential right must be strictly construed; Guaranty Co. *vs.* Green Cove R. R. Co., 139 U. S., 142; Farmers' Co. *vs.* Chicago R. R. Co., 61 Fed. Rep., 546; Toler *vs.* East Term. Co., 67 Fed. Rep., 179. Moreover, as the provision enabling a mortgagee to take possession of mortgaged premises is held to be cumulative, Morgan *vs.* Texas

Central Co., 137 U. S., 171; Mercantile Co. *vs.* Missouri, etc., Co., 36 Fed. Rep., 221; Farmers' Loan, etc., Co. *vs.* Winona, etc., Co., 59 Fed. Rep., 957; Dow *vs.* Memphis, 20 Fed. Rep., 260; Credit Co. *vs.* Arkansas, etc., Co., 15 Fed. Rep., 46; Alexander *vs.* Central R. Co., 3 Dill, 487, it follows that limitation on the exercise of such specific cumulative power, cannot restrict the general generic right of foreclosure incident to the mortgage.

The provision in the present mortgage relating to foreclosure by bill in equity is found in the last clause of article third. The
166 clause therein found, "That in case default shall be made, as aforesaid," refers to the default specified in article second relating to entry, *sub conditione*, by the trustee and to the default specified in the first part of section third, relating to a public sale, *sub conditione*, by the trustee. The first provision relates, *inter alia*, to a default in payment of interest, and is as follows: "In case default shall be made in the payment of any installment of interest on any of the aforesaid bonds, according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement or stipulation herein contained, and hereby required to be kept and performed by the said party of the first part, and if such default should continue for the period of six months after demand, made in writing by said trustee, upon said party of the first part, for the payment of the said moneys or the performance of the said covenants, it shall be lawful for the said trustee * * * to enter into or upon * * * the premises hereby conveyed."

The second provision, found in the opening of section third, embraces the default of interest specified above and adds the default of principal. It is as follows: "In case default shall be made as aforesaid, or in case default shall be made in payment of the principal of any of the said bonds or any part thereof, and in case such default shall continue for the period of six months after demand, made in writing, by the said trustee, for the payment of the said moneys, or the performance of the covenant or covenants, it shall be also lawful for the said trustees, and upon receiving a written requisition, signed by majority in value of the bonds secured hereby, then outstanding with proper indemnification against costs, compensation and expenses, it shall be the duty of the said trustee, or its successor or successors, after entry as aforesaid, or other entry, or without entry, personally, or by its attorney or agent, to sell and dispose of all and singular the premises, franchises and contracts hereby conveyed and assigned or intended so to be, as an
167 entirety, or such part or parts of the same as shall be necessary, from time to time, at public auction."

The last clause of section third provides for judicial foreclosure and is as follows: "And in case default shall be made as aforesaid and shall continue as aforesaid, it shall also be lawful, and it shall be the duty of the said trustee and its successor or successors in the said trust, upon receiving a written requisition, signed by the holders of one-third in value of the bonds hereby secured and then outstanding, after entry as aforesaid, or other entry, to commence and

prosecute such actions, suits or proceedings at law, or in equity, as shall be necessary to obtain the sale of the said premises, by and under judicial authority, and to bar and foreclose the equity of redemption of the said party of the first part, its successors and assigns, and of all persons claiming under them, or any of them, and the said premises hereby conveyed or intended so to be, with the appurtenances, and every part and parcel thereof."

Analysis of these three provisions shows that the first authorized an entry by the trustee in case interest was defaulted for six months and retention and operation of the property until such interest was paid from the profits. Action under this provision was wholly at the will of the trustee. The bondholders had no voice or compelling power in its exercise. The second provision was for a public non-judicial sale by the trustee. To the default of interest specified in the preceding section there was added default in payment of bond principal, and there was superadded a clause empowering a majority in value of the bondholders on giving indemnity for costs, to compel the trustees to make such non-judicial sale. The third provision, it will be noted, is for the same defaults, authorizing the entry of judicial procedure by the trustee. It is contended by the respondents that by this last provision the trustee could not resort to such judicial proceedings to foreclose unless upon the re-
168 quest of one-third of the bondholders. By the complainants it is contended that the language used was not a limitation upon the right of the trustee to resort to judicial proceedings, but conferred on the bondholders the power to compel the trustees to do that which the default made it lawful and discretionary for it to do without such request.

After careful consideration we are of opinion the contention of the complainant is right. It is the natural construction of the language used and is in accord with the general scheme of the mortgage. The first provision defines what it shall be lawful for the trustee to do in the way of simple entry and taking temporary possession. This provision, within the scope of its operation, broadly empowers such trustee to act but imposes no duty upon him to do so or empowers the bondholders to impose none. In the broad, untrammeled enabling power thus vested in the trustre we find the construction and scope of the term "it shall be lawful" as employed in this mortgage.

In the second provision relating to non-judicial sales, we find the same thought in the words "it shall also be lawful," but find an added duty is cast on the trustee; that is, on request of a majority of the bondholders, the trustee is compelled to sell. That this is the proper construction of this clause there can be no question. Any other reading is a distortion of words. Now, the same general idea is found in the provision for judicial proceedings. The same words, "it shall also be lawful," are found and serve to indicate untrammeled, enabling power vested in the trustee. While introduced by the copulative "and," and in conformity with the preceding provision, is the act which the bondholders can compel the trustee to perform.

To read the terms "it shall also be lawful," and "and it shall be the duty of the trustee," as synonymous and simply imposing a duty on the trustee at the request of the bondholders, is to deny the first phrase the meaning it unquestionably bears in the two preceding sections. Such construction would vest the trustee with the
169 broadest discretion to make a non-judicial sale where he could easily abuse the power and shear him of all personal discretion in seeking a remedy by a judicial sale where the court could check any abuse of discretionary power. To warrant such construction the language should be so explicit that no other was possible.

After careful consideration it is clear to us that the provision in reference to the bondholders was an enabling power to be exercised at their option and not a limitation or shearing of the right of the trustee to foreclose.

We are therefore of opinion the trustee had a right to file the present bill without a prior request by one-third of the bondholders.

This brings us to the second question, namely, whether the Penn Plate Glass Company or W. L. Kann, the subsequent purchasers, of the mortgaged premises can question the validity of the mortgage in suit. It will be noticed that the mortgagor is not contesting the right to foreclose or the validity of the mortgage. The mortgage is assailed by the successive purchasers, to wit: Kann and the Penn Plate Glass Company. In examining the authorities cited we must distinguish between those bearing on the question whether a purchaser has personally assumed payment of an existing encumbrance and those which involve the question whether he takes subject to it. The question now before us is whether the purchasers took the land incontrovertibly subjected to the lien of the prior encumbrance, to wit, the mortgage in suit.

This is a mixed question of fact and law. The Pennsylvania Plate Glass Company, having become insolvent, the court of common pleas of Westmoreland county, by virtue of the equity powers conferred by the Pennsylvania statute took jurisdiction of its assets and possession thereof by its receiver, and enjoined W. L. Kann, the execution creditor, from proceeding on his execution. The mortgage in suit was not then due or defaulted, the trustee was
170 not made a party to the bill and the mortgage being a first lien and duly recorded, the property unquestionably came to said court subjected to the lien of the mortgage. Later the receiver presented a petition to said court to sell the mortgaged property. If the mortgage was *ultra vires*, was fraudulent, or was given without consideration, it was in the power of the receiver or the corporation by appropriate remedy to free the company's land from such unlawful lien. Not only did he omit to do this, but he elected to sell the equity of redemption and to expressly subject the land in the hands of the purchaser to the lien of the mortgage. His purpose to allow the mortgage debt to remain charged on the land and thus avoid requiring prospective purchasers to pay the entire sum at once, is shown in the petition, which says: "He further suggests to the court that the interest on the $250,000 of bonds owed by said

company will fall due on July 1st, next, and that there is no way within his power by which the said interest can be paid, and the bonds prevented from falling due in accordance with the terms of the mortgage.

If the real estate and plant of the said company are to be sold, in the opinion of your petitioner such sale should be held, some time before July 1st, for the reason that the property can then be sold subject to the lien of the first mortgage, and therefore a very much less sum of money will have to be raised by the purchaser, than if the plant were to be sold under foreclosure proceedings by the trustees in the mortgage. This will result in opening the field to a larger number of bidders, and will probably have the effect of realizing more money from the sale for the benefit of the creditors and possibly of the stockholders than could otherwise happen."

The order of sale provided "Property to be sold subject to the lien of the first mortgage of $250,000 to secure the pay-
171 ment of the bonds, which said mortgage is recorded in Westmoreland county in Mortgage Book 43, page 1, and subject to all taxes for the year 1894."

The return cites the sale made in accordance with the order, and that the property "was sold subject to the payment of the first mortgage and taxes for 1894 discharged of all other liens to W. L. Kann for the sum of $37,000.00." The sale being confirmed a receiver's deed was made July 2nd, 1894, to Kann, which recited "The above-described property, under the order of court aforesaid, was sold and is now conveyed by the said receiver and was bought and is now accepted by said grantee, subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company of the City of New York, dated first January, 1891, recorded in Westmoreland county in Mortgage Book No. 43, page 1, and subject also to all taxes for the year 1894." It will be noted that the purchaser was the execution creditor who was enjoined from proceeding on his execution and who, as a party to the proceedings, must be presumed to have had notice and knowledge thereof.

Acceptance of deed bound the grantee to its conditions. "A grantee having accepted a conveyance and enjoyed its benefits is bound by its provisions. Keller *vs.* Ashford, 133 U. S., 620, and the language used and the acts of the parties were such as to subject the land to the mortgage burden. So far as the corporation could do, this company by its receiver and under the supervising control of a court of equity waived all question as to the validity of the mortgage and elected to sell the mere equity, subjected to its lien. The title acquired and the condition on which it was acquired being part of the same act, the acceptance of the former *ipso facto* weighted it with the accompanying burden. As to the legal effect of such action on the part of the selling mortgagor and the accepting vendee, we think the vendee accepted and was bound by the status of the mortgage as the mortgagor elected to leave it. The creator of the lien, who had the right to attack it or confirm it, has, prior
172 to the purchaser acquiring any interest whatever in the land, elected to ratify it and sell the land subject to it. If in so

doing he has done what he ought not to have done, or left undone what he ought to have done, that concerns the vendor alone. Such act has done the vendee no harm, has caused him no loss. What right therefore, what equity, what interest, what standing has the purchaser to question what his vendor has done; what right has he to release the land from the burden to which the vendor has chosen to expressly subject it? What equity or whose equity would be worked out by such a course? The question in hand is not as to the effect of a judicial sale of encumbered property without any specification of liens in the order of sale of which Hackensack *vs.* De Kay, 9 Stewart, 552, is an instance, but it is the case of a court exercising its power to sell specifically subject to a lien and a deed made expressly subjecting the property conveyed to a specified recorded lien. In such case the purchaser of mortgaged premises takes but an equity of redemption; he cannot question the validity of the mortgage, else he would acquire an interest in the land never conveyed to him by the vendor. Freeman *vs.* Auld, 44 N. Y., 50; Johnson *vs.* Thompson, 129 Mass., 398; De Wolf *vs.* Johnson, 10 Wheaton, 367; Calkins *vs.* Copley, 29 Minn., 471; Tulle *vs.* Stevens, 98 Mass., 305; Dolman *vs.* Cook, 1 McCarter, 50; Conover *vs.* Hobart, 9 C. E. Green, 120; Post *vs.* Dart, 6 Paige's Ch. Rep., 639; Shufelt *vs.* Shufelt, 9 Paige's Ch. Rep., 137; Green *vs.* Kemp, 13 Mass., 515; Morris *vs.* Floyd, 5 Barbour, 130.

The cases from the various State courts disclose convincing reasons in support of the principle. The Federal cases are to the same effect.

In Bronson *vs.* La Cross R. R. Co., 2 Wallace, 311, a third mortgage was given by a railroad company, and in express terms was made subject to the bonds secured by a prior second mortgage. On foreclosure proceedings under the third mortgage the road
173 was sold. Subsequently a bill to foreclose was filed by the trustees of the second mortgage, and a company which owned the equity of redemption was made a party. An attempt was made to question the validity of the second mortgage. But the right to do so was denied. The court there say: "Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, then the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with a full notice of the acknowledgment of the indebtedness and previous lien; and, especially, what right have the Milwaukee and Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous encumbrance of $1,000,000? They have the benefit of that encumbrance by an abatement of that amount in the price of the purchase."

In Jerome *vs.* McCarter, 94 U. S., 736, the same doctrine was announced, the court saying: "Nor is their any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the

company — estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two $500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior mortgagee expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it."

In American Water Works Co. *vs.* Farmers' Loan Co., 37 Fed. Rep., 962, the question now before us was considered by the circuit court of appeals of the eighth circuit. In that case the
174 American Water Works Company of Illinois, having given two mortgages, sold its plant to the American Water Works Company of New Jersey, by a deed which described the said mortgages, and recited that the property was conveyed to the grantee company, "subject to said incumbrances." On a bill to foreclose it the purchaser sought to attack the validity of the mortgages. In holding this could not be done, the court said, "The New Jersey company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois company, by virtue of the well-established rule that a purchaser of property who accepts a conveyance thereof which described encumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances. One who thus buys property has no right to challenge the validity of a mortgage lien existing thereon at the date of his purchase, which his grantor by the terms of his conveyance did not see fit to challenge, but recognized in the most formal manner by declaring that he conveyed the property subject to the existing lien. Whether such mortgage is valid or otherwise is no concern of the purchaser, for in contemplation of law he only acquires an equity of redemption in the property conveyed to him—that is to say, a right to discharge the mortgage debt—and it would be a breach of good faith, having purchased this right and nothing more, to deny the validity of the incumbrance, and seek to avoid the payment thereof on that ground. As between the grantor and grantee in a conveyance made subject to an existing mortgage, the amount of the incumbrance should be regarded as a part of the purchase price left unpaid at the date of the conveyance which the grantee undertakes to pay. At all events, he impliedly agrees not to challenge the validity of the incumbrance. The authorities to this point are amply sufficient, in our opinion, to preclude the New Jersey company from defending against the foreclosure on the ground that the mortgage is invalid."

175 In view of these authorities and of the inherent justice of such a course we hold that the land having been expressly made subject to the mortgage in suit, and having been purchased and accepted by W. L. Kann, and subsequently by the Penn Plate Glass Company, subject to the same, neither of said parties can question the validity.

No valid reason, therefore, being shown to the contrary, a decree

of foreclosure will be entered. Of the right of individual bondholders to participate in the proceeds of said foreclosure we express no present opinion.

*Supplemental Bill.*

During the pendency of the original bill the improvements on the mortgaged land were burned. An insurance of some three hundred thousand dollars, placed during the pending of the original bill, was on these buildings. Thereafter the trustee filed a supplemental bill, making the insurance companies parties, alleging the existence of an equitable lien on said insurance in favor of the bondholders and praying the appointment of a receiver to collect and hold the proceeds of the policies. Such receiver was thereafter appointed. He has collected the larger part of the insurance and holds the same subject to the order of this court. It therefore becomes the duty of the court to pass on the question of equitable lien.

There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract no obligation whatever exists. When, therefore, the Pennsylvania Plate Glass Company, in its mortgage enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilling of such requisition upon itself it imposed it upon no one.

176 Indeed the nature of the acts which the trustee was empowered in its discretion to require shows that they were such as the mortgagor would naturally perform. Thus the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are therefore of opinion that by the terms of the mortgage, the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced by the State court during the receivership, by its issue of receiver's certificates for the purpose. These policies were in force when Kann purchased. The proofs show they were turned over to him and he was informed by the receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months vesting a right of entry and possession of the trustee, we next inquire what was the relation to this duty of a successor in the possession and title of the mortgagor to

whom such possession was delivered and the equity of redemption conveyed by an order of court and deed based thereon, in the terms set forth in the foregoing opinion bearing on the original bill.

It has been strongly urged that the covenant to insure does not run with the land, and that this fact governs the case. But this, as we view it, is not the crucial question of this cause. If the insurance made by the purchaser is impressed with an equitable
177 lien in favor of the trustee it is not because the mortgagor's covenant runs with the land, but because from the nature and subject-matter of the duty assumed by the mortgagor, the terms of the deed and its acceptance, the facts and circumstances of this particular case and the law bearing thereon, the insurance placed by the purchaser becomes so liable.

To the consideration of such facts and the law thereunto appertaining we now turn. In an opinion herewith filed disposing of the original bill we have recited at length the provisions of the mortgage, the insolvency of the mortgagor company, the receivership proceedings in the court of common pleas of Westmoreland county, the sale of the property, together with the proceedings leading thereto, and the deed made in pursuance thereof. The property was purchased by W. L. Kann for the sum of thirty-seven thousand dollars and conveyed to him by deed dated July 2d, 1894. He held the property until July 1st, 1895, when he conveyed the same to the Penn Plate Glass Company, of which company he was president, for $83,500. His deed recites, "The above-described property is now conveyed by the said parties of the first part and is now accepted by the said party of the second part, subject to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand ($250,000) dollars, dated Jan. 1, 1891, recorded in Westmoreland county in Mortgage Book No. 43, page 1. Being the same property which Joseph W. Stoner, receiver of the Pennsylvania Plate Glass Company, conveyed to Wm. L. Kann by deed dated July 2, 1894, and recorded in Westmoreland county in Deed Book 235, page 257." The interest on the bonded indebtedness falling due on July 1st, 1894, and January 1, 1895, was paid by Kann, but that payable July 1st, 1895, was defaulted. On November 29, 1895, written demand was made by the trustee upon the mortgagor, its receiver, upon Kann and the Penn Plate Glass
178 Company to insure for the benefit of the bondholders. They failed to do so, and such default continued for more than six months prior to the filing of the bill. On the filing of the bill the trustee moved for the appointment of a receiver to take possession. The plant was then being operated by the Penn Plate Glass Company, a large number of persons employed, the issues of the cause and the legal rights of the parties not determined. In this aspect of the cause and the court being satisfied that a receiver could not operate the works, it declined to appoint a receiver. The question of insurance arose during the pendency of the application for a receiver, and thereupon counsel for W. L. Kann and the Penn Plate Glass Company signified their willingness to place insurance upon the

property for the benefit of the trustee if they were bound to do so, but denied the liability of said parties to do so. Subsequently they did place a large amount of insurance upon the property, and during the pendency of the motion filed a guarantee, signed by W. L. Kann (the president of the company) and Emanuel Wertheimer (a stockholder) conditioned as follows:

"That in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust, for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such valid bonds, out of policies of insurance existing in favor of the Penn Plate Glass Company."

"Provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage."

179 "And it is provided, further, that in the event of a loss by fire, and the insurance money payable in that event is applied to the restoration of the plant of the Penn Plate Glass Company, bound by the said mortgage, that then this obligation shall be null and void, without prejudice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain policies of insurance on said plant, at any time for the benefit of holders of valid bonds secured for the said mortgage, or for the trustee of said mortgage. And it is further distinctly understood and agreed that in the event of partial losses and partial restorations the amount of the insurance money applied thereto shall be a credit on the account for which we have become bound by this obligation."

After the loss it appeared that in the insurance placed, the Penn Plate Glass Company, and W. L. Kann, its president, had placed a provision therein in terms excluding the bondholders from any interest in the policies. Whatever may be the effect of such provision as between the insurance companies and the insured, we do not regard it as a material consideration here. It was an act *inter alias acta*, the trustee and the court had no knowledge of it, it was not done in pursuance of any agreement and can in no way affect the legal and equitable status and rights of the parties before the court. For if the purchaser was bound to insure for the benefit of the trustee equity will consider the policies as placed in fulfillment of that duty, for it considers that as done which ought to be done, Pomeroy's Equity Jurisprudence, § 364–377. It always implies an intention to fulfill an obligation, *Ibid.*, § 420–422. It regards and treats that as done which in good conscience ought to be done, *Ibid.*, § 364.

The question of the effect of acceptance of a deed reciting that property was conveyed subject to a specified encumbrance is discussed in many Pennsylvania cases. In some it was held a personal

liability or an assumption of the encumbrance direct to the
180 original creditor was created, in order that no such direct liability to the original creditor arose, but an agreement by the vendor with his vendee to indemnify the latter against having to pay the encumbrance. To warrant a decree for an equitable lien in this case it is sufficient to hold that as regards the covenant to insure there was an agreement to indemnify, though from the nature of the subject-matter, and the special facts and circumstances there are grave reasons for contending that the purchaser of the property in this case became directly liable to the trustee to insure.

The covenant of the mortgagor in reference to insurance was *sui generis*. It was not a covenant which necessarily bound the mortgagor to the performance of any present or future thing. It obligated insurance, it is true, but only in case it was required by the trustee. The trustee might never exercise its right, hence while the possible liability existed there was no certainty it would ever attach. From these considerations it is clear that when the mortgagor came to sell the property there was no exact financial value which could be put upon this covenant to insure. It could not be a subject of barter and sale, because liability under it depended wholly and solely on the will of the trustee. It was created by the mortgage, but was a matter to be performed in future; but at once if required. Now with this unfulfilled, future and indefinite liability clearly resting by the mortgage on the mortgagor at the time of the sale, what, as between the vendor and vendee, became of it when the property was sold and the vendee by the terms of the deed left the purchase-money to the extent of the mortgage debt in the land and agreed to indemnify the vendor against it. The duty to insure was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the supreme court of that State in Miller *vs.* Aldrich, 31 Michigan, 416, when speaking of the relation of a covenant to insure to the mortgage: "Chapman had bound himself to
181 afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn.

This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and on all others in his shoes with notice." Now if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt, shall he not much more be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of ensuring the payment of such mortgage debt? By the authorities already cited, it is clear that by the terms of the deed this property was subjected incontrovertibly to the burden of this mortgage. It did not lie in the purchaser's mouth to question or release the land from the burden to which he and his vendor had subjected. So much for the rights of the trustee. As between the vendee and the vendor,

the authorities are clear that by the terms of the deed the vendee agreed to indemnify the vendor against liability on the mortgage. Conceding for present purposes that on a sale under the mortgage of the premises personal liability of the mortgagor for the bonded debt ceased, yet, in the first place, no sale has thus far taken place, and in the second the company is still liable for the mortgage debt by virtue of its covenant to insure, and hence the need of indemnity against such covenant to insure. Was this liability indemnified by the vendee's acceptance of the deed? In Campbell *vs.* Shrum, 3 Watts, 60, the leading Pennsylvania authority, it was held that acceptance of an agreement to convey land "under and subject to the payment of all the purchase-money and interest now due" by a specified article of agreement, constituted an assumption by the vendee. In Blank *vs.* Garman, 5 W. & S., 42, the principles
182 of an "under and subject" purchase are discussed, and it is there said, "Had the defendants below purchased the property subject to the mortgage debt, the case would have been within the principle of Campbell *vs.* Shrum, because the price would have been estimated at the clear value less the mortgage debt, and it may be said that so much of the price would have been virtually retained to answer it; so that the plaintiff would have answered that much, had he been compelled to pay with other funds than those set apart for the purpose in the defendant's hands. As it would have been a fraud in them to retain his money and let him be pursued for it on his bond, they would have been held liable on an implied promise to apply it to the purchase intended; and it may be said in every such case, that he who purchases expressly subject to an encumbrance, as between the vendor and himself, makes the debt his own, which is the principle of Campbell *vs.* Shrum."

In Woodward's appeal, 38 Pa. St., 327, the words of the deed were, "subject to the payment of $2,000—the mortgage debt." It was there said: "It cannot be doubted, that accepting a deed from Mr. Spackman for the house and lot, expressly subject to the mortgage, was an assumption by the vendee to pay it. The debt secured by the mortgage was that of the vendor, and if its payment was not assumed by the vendee, the express subjection of the property to it, by the deed, amounts to nothing; the ultimate liability is still upon the vendor, and not upon the house, and the vendee has acquired the entire ownership without paying or being liable to pay any more than the sum of $8,750.00."

In Moore's appeal, 88 Pa. St., 452, prior cases were examined by Judge Sharswood and summed up as follows: "An examination of the cases which have been decided on the legal effect of such a clause in a conveyance, shows, we think, that unless there exist special circumstances to raise a covenant to pay the encumbrance, it amounts only to an indemnity to the vendor," in the lan-
183 guage of the opinions "the vendee makes the debt his own as between him and the vendor for his protection."

The question is not affected by the Pennsylvania act of June 12th, 1878, P. L., page 205, which provides that the grantee of real estate

bound by mortgage, etc., shall not be personally liable therefor, except on an express assumption and that the use of the words "under and subject to the payment of such ground rent, mortgage or other encumbrance," shall not alone be construed as to make such grantee personally liable as aforesaid.

Prior to the passage of this act, as we have seen, it was held in some cases that the under and subject clause constituted a direct assumption of the debt to the holder of it; in others that it created a mere agreement as between vendor and vendee to indemnify the vendor against the encumbrance. The act was then passed, which as we read it, provided that the under and subject clause alone should not be construed to create a personal liability for the debt, that is a direct assumption to the owner, but left unaffected the implied covenant to indemnify, as between vendor and vendee. In other words, while the purchaser subject to such encumbrance did not assume payment of the debt to the holder, he was still bound to indemnify his vendee against the incumbrance. In Blood *vs.* Crew, 171 Pa. St., 333, the deed of the freehold portion, made after the passage of the act, recited it was "under and subject to the lien" of a mortgage and contained the further provision, "It is hereby agreed between the parties to this instrument that the said party of the second part accept the title * * * subject to the payment of the mortgages herein mentioned." Of these provisions the court say: "We have then an implied covenant to indemnify arising from the 'under and subject to the lien of' clause and an express covenant in the stipulation beginning with the words, 'It is hereby agreed' to pay the mortgage debt to the holder of the mortgage."

After careful consideration of the law applied to this case
184 we are of opinion that Kann and the Penn Plate Glass Company, the subsequent purchasers of the equity of redemption, undertook to indemnify the mortgagor against liability on its covenant, in the mortgage to insure.

The proofs show that request to insure was duly made by the trustee upon the mortgagor and upon the subsequent purchasers, which request was not complied with. It would therefore seem that by such failure to insure there was a default and a direct liability of the mortgagor to the trustee upon the covenant to insure and there was a default and a liability of the subsequent purchasers to the mortgagor upon their agreements to indemnify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months it became such a breach as warranted the trustee in either taking possession, selling at non-judicial sale or maintaining foreclosure proceedings.

After the bill was filed, a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a receiver to take possession of the mortgaged premises, as we have noted above.

Under the facts it would seem that a court of equity having jurisdiction of the subject-matter and of all parties, had power to, and to

avoid circuity of action, would direct the purchaser to insure for the benefit of the trustee.

This court had jurisdiction of the mortgage and therefore of the mortgagor and mortgagee. Kann and the Penn Plate Glass Company, who had bought subject to it were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that where equity jurisdiction has once rightfully attached to a controversy it will be made effective
185 for the purpose of complete relief and to dispose of all incidental and germane questions. Fetter on Equity, page 13; Winton's appeal, Pa. St., 97, p. 395; Allison's appeal, 77 Pa. St., 227; McGowan *vs.* Remington, 2 Jones, 63; Souder's appeal, 57 Pa. St., 498; Soucher's appeal, 104 Pa. St., 615. The trustee having exercised its right of acquiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the court, it would seem clear to us that a court of equity, by its very nature constituted with plastic power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A court of equity having original jurisdiction to compel specific performance of a contract to indemnify—Chamberlain *vs.* Brown, 6 Blackf., 490; Champion *vs.* Brown, 6 Johns. Ch. Rep., 398; Fry on Specific Performance (3 American edition), p. 704, its jurisdiction and power to do so in this case where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where moreover the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the court did not see fit in an interlocutory state of the case to make such order, that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so, cannot effect the relative right of the parties. Mere lapse of time will not prevent a court of equity from affording relief where there was a right to relief when the bill was filed. Wilkinson *vs* Torkington, 2 Younge & Collyer's Reports, 729.

Pending the appointment of a receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively
186 gains by the destruction of that for which it had never paid, to wit: the $250,000, representing deferred purchase-money.

Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the court as to its liability to do so, why should not the court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party

to this litigation under stress of an application for the appointment of a receiver and a consequent exclusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee and was bound to do so if thereto required by the court. When now on final hearing the proceeds of that insurance is before the court, when the position of the parties has not been changed, why should not this court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order?

The position of the parties has not changed. To say that the trustee had an insurable interest and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers with full knowledge of that duty on the part of the mortgagee, took the property and undertook to indemnify the vendor against this covenant. This they have not done. They paid some $83,000 for the property. They insured it for more than three hundred thousand dollars and now on the destruction of the property, which was the substantial security for $250,000 owing the trustee, they seek to avoid payment of the $250,000 and to realize on the $83,000 paid by them the sum of upwards of $300,000.00 in insurance upon property for which they have never paid.

The allowance of such a result under the facts and circum-
187 stances would be highly inequitable, for it is a principle of equity that in a contest between one who, seeking to make a gain and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. Miller *vs.* Aldrich, 31 Mich., 416.

After careful consideration, therefore, we are of opinion that to the extent of all valid outstanding bonds represented by the trustee, this fund is in equity and good morals stamped with an equitable lien, and that it is the duty and right of this court to enforce it.

*Decree.*

This case came on to be heard at this term upon the original and supplemental pleadings, and upon the proofs, and was argued by counsel, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed, that the mortgage set forth in the original bill of complaint herein, made by the defendant, The Pennsylvania Plate Glass Company, to the complainant, The Farmers' Loan and Trust Company, bearing date the first day of January, 1891, is a valid and subsisting mortgage and constitutes a first lien, except as such lien has been released as herein stated, upon the mortgaged premises and property, which said premises and property are described in the said mortgage as follows (the words "party of the first part" in said description referring to the said Pennsylvania Plate Glass Company):

"All that certain tract of land, with the buildings and improvements thereon, situated in North Huntington township, county of Westmoreland and State of Pennsylvania, bounded and described

as follows: Beginning at a post on the northwest corner of Fourth street and Broadway avenue, in the town of Irwin; thence by the line of said Fourth street north 1 degree 18 minutes east, nine hundred and fifteen (915) feet to a post; thence by land of C. W.
188 Pool north 88 degrees 42 minutes west, five hundred and eighty-six (586) feet to a post; thence by same north 65 degrees 50 minutes west, four hundred and two feet six inches (402 ft. 6 in.) to a post; then by same south 2 degrees 67 minutes east, four hundred and seventy-six (476) feet to a public road and line of Swigger's heirs; thence by same south 65 degrees 50 minutes east, one hundred and fifteen (115) feet to a post; thence by same south 23 degrees 10 minutes west, five hundred and twenty-seven (527) feet to a post on line of Broadway avenue; thence by said avenue south 49 degrees 42 minutes east, one hundred and three feet to a post; thence by said avenue south 88 degrees 42 minutes east, nine hundred and thirty-one (931) feet to a post at Fourth street, the place of beginning, containing twenty-one (21) acres more or less.

"Being a part of a tract of land called 'Fruit Hill,' for which a patent was issued by the Commonwealth of Pennsylvania to William Elliott, dated 2nd May, 1788, and part of which land so patened became vested in C. W. Pool by deed from J. L. Ewing *et ux.*, by deed recorded in Westmoreland county aforesaid, in Deed Book 177, page 135, and being the same tract of land which the said C. W. Pool conveyed to Philip Semmer by deed dated the 16th day of June A. D. 1890, and recorded in said county in Deed Book 184, page 410, and thereafter conveyed by said Philip Semmer to the party of the first part hereto by deed dated the 28th day of August, 1890, and recorded in said county in Deed Book 184, page 408.

"And also all the right, title and interest of said party of the first part of, in and to and arising from a certain assignment made by A. C. Boyd and Philip Semmer, as partners, composing the firm of A. C. Boyd and Company, to it, the said party of the first part, bearing date August 30, A. D. 1890, wherein and whereby, for and in consideration of one dollar, said A. C. Boyd and Company sold, assigned, transferred and set over unto said party of the first part hereto,
189 all their right, title and interest of, in and to certain contracts whereby the Irwin Natural Gas Company for certain valuable considerations, contracted and obligated themselves to furnish natural gas in sufficient quantities for the successful operation of a plate-glass plant, having a capacity of three twenty-pot furnaces with the necessary annealing ovens and appliances and all other uses necessary for the proper operation of said plant for and during the term of ten years from the 16th day of June, A. D. 1890, subject to the rules and regulations of said Irwin Natural Gas Company, the said plate-glass plant above referred to being situate on the above-described premises of the party of the first part.

"And also all of the right, title and interest of the party of the first part of, in and to and arising from a certain contract now held and owned by it through mesne assignments made between C. W. Pool and Philip Semmer, bearing date the 16th day of June, A. D. 1890, wherein and whereby said C. W. Pool agreed for the sum of

one dollar per annum to deliver at the property line of the premises as above set forth, a sufficient quantity of water to supply all the needs of the plate-glass plant to be erected thereon, for a period of three years from the 16th day of June, A. D. 1890, subject to the rules and regulations of the Irwin Water Company. Said plant referred to now being erected by party of the first part.

"And also all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises.

"Together with all and singular the tenements, hereditaments and appurtenances belonging to the said above-described premises, or thereunto in anywise appertaining, and the reversions, remainder,
income, rents, issues and profits thereof, and also all the
190 estate, right, title, interest, property, claim and demand
whatsoever, as well in law as in equity, of the said party of the first part of, in and to the said premises, and every part thereof with the appurtenances."

Since the making of said mortgage, and on or about the — day ——, 1892, a small strip of said premises consisting of $\frac{93.6}{1000}$ acres was, in consideration of the receipt of $300 by the complainant herein, duly released from the lien of said mortgage by release executed by the said complainants on the — day of ——, 1892, and recorded in the office of the recorder of Westmoreland county, in the State of Pennsylvania, in — Book, page —, and the said strip of land so released is no longer subject to the lien of said mortgage. The complainant holds said consideration of $300 as trustee for and to the use of the bonds and coupons secured by said mortgage as part of the security of said mortgage.

And it appearing to the court that since the filing of the opinion of the court herein, the Pennsylvania Railroad Company, claiming to exercise the right of eminent domain under the laws of the State of Pennsylvania, for the purpose of widening, straightening and improving its tracks, has entered into possession of a certain portion of the said mortgaged property and premises, and has given bond in the court of common pleas of Westmoreland county, Pennsylvania, to pay all damages resulting from the said taking and condemnation.

It was further ordered, adjudged and decreed, that the complainant, as such mortgagee, has a first lien upon any and all damages arising from the condemnation of the mortgaged premises which may be collected under said bond, or because of said taking and condemnation, to the extent hereinafter specified.

It was further ordered, adjudged and decreed, that the lien of the
said mortgage is prior and superior to any other lien or claim
191 of any kind or description in favor of any party to this cause;
that default has been made in the payment of interest due on the bonds secured by said mortgage entitling the complainant to a sale of the said mortgaged property hereinabove described, unless the defendants or some of them shall pay the amount of the entire bonded indebtedness secured by said mortgage, with all the

costs and expenses of this suit at a short day to be fixed by the court. That there are secured by said mortgage lien a large number of bonds and coupons, with interest thereon, of the said defendant, The Pennsylvania Plate Glass Company, which are outstanding and past due, such coupons so outstanding and unpaid being coupons which matured and fell due on the first day of July, 1895, and every six months after that date.

And it appearing to the court that the defendant, The Pennsylvania Plate Glass Company, executed two hundred and fifty bonds of one thousand dollars each, being bonds to secure which, the mortgage under foreclosure herein was executed and delivered, and that said Pennsylvania Plate Glass Company, having executed said bonds, presented them to the complainant, as trustee, for certification, and that said complainant thereupon certified the same and delivered them upon the order of the said Pennsylvania Plate Glass Company.

It was further ordered, adjudged and decreed that it be referred to William R. Blair, Esq., as special master, to ascertain and report, which of said bonds, so certified as aforesaid, are entitled to the security of said mortgage, the principal sums due and unpaid on said bonds, and the entire aggregate amount of such principal sums; that said special master may hold sessions in the cities of New York, in the State of New York, or Pittsburgh, in the State of Pennsylvania, and at such other places within the United States as he may deem proper, giving five days' notice by mail or otherwise of such sessions to the complainant, the defendants, The Penn Plate
192 Glass Company and W. L. Kann and to Emanuel Wertheimer, James G. Beamer and all other bondholders whose names and addresses are known to the complainant; and that said special master report to the court within ninety days from the date of this decree. And it is hereby ordered and decreed that any party or person so to be notified, and appearing before said special master may read in evidence any part of the testimony heretofore taken in this cause with like effect as if such testimony had been taken before said special master.

And it was further adjudged and decreed, that upon all said bonds which said special master shall report to be entitled to the security of said mortgage, the complainant is entitled to recover not only the amount of the principal of said bonds and the coupons thereon, but also interest upon the said coupons from the maturity thereof until the date of this decree, and interest on the said principal from the date of the maturity of the last coupon, to wit, the first day of July, 1899, to the date of this decree. And it was further adjudged and decreed that the aggregate amount of all the said two hundred and fifty bonds, valid or otherwise, together with the coupons thereon, and the interest on the said bonds and coupons up to the date of this decree is the sum of three hundred twenty-five thousand eight hundred fifty dollars.

And it appearing to the court that a very large part of the said mortgaged property has been destroyed by fire, but that the remaining property can best be sold as an entirety.

It was further ordered, adjudged and decreed, that the mortgaged property is so situated that it cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same; and further, that the said defendant, The Pennsylvania Plate Glass Company, is utterly insolvent and unable to pay its debts and liabilities.

It was further ordered, adjudged and decreed, that unless the parties defendant, or some of them, shall, on or before the
193 expiration of twenty days from the entry of this decree, pay the complainant the following sums, namely: First, a sufficient sum of money to pay the costs of the complainant in this cause as they shall be taxed and its compensation as trustee, with its counsel fees and other expenses, and other disbursements as the same may be fixed by this court; and, secondly, the entire sum due for principal and interest, and interest on unpaid coupons up to the date of this decree, with interest thereon from the date hereof, then all the said mortgaged premises and property remaining after said fire, shall be sold as hereinafter directed, subject only to such easement or right therein as the said Pennsylvania Railroad Company may have acquired, or may hereafter acquire, by virtue of the aforesaid taking and condemnation proceedings; provided, however, and it is hereby expressly adjudged and decreed, that nothing herein contained shall be so construed as to entitle any purchaser of the mortgaged premises at such sale to collect or receive all or any part of the damages arising from the taking and condemnation of the mortgaged premises accruing by reason of such taking and condemnation; but all such damages the complainant herein is hereby expressly authorized, empowered and directed to reserve to itself for the use and benefit of the said mortgage and the bonds thereby secured, as hereinafter directed; and all the right and equity of redemption of the defendants, and each and all of them of, in and to the said mortgaged premises, property and assets, and every part and parcel thereof, shall be forever barred and foreclosed.

It was further ordered, adjudged and decreed, that if default be made in making either of said payments within said twenty days, then all the said mortgaged premises and property, real, personal and mixed, wherever situated, so remaining after said fire, shall be sold as aforesaid as an entirety, and without an appraisement or right of redemption, at public auction to the highest bidder therefor, at twelve o'clock noon, upon the mortgaged premises in
194 the town of North Irwin, Westmoreland county, in the State of Pennsylvania, on a day to be named by the special master, herein appointed to make such sale, in his notice of sale; that before making said sale, the said special master shall publish a notice thereof, once a week for at least four successive weeks prior to each sale, in one daily newspaper printed, regularly issued and having a general circulation in Greensburg, in Westmoreland county, in the State of Pennsylvania, and in one daily newspaper printed, regularly issued and having a general circulation in the city of Pittsburgh, in Allegheny county, in the State of Pennsylvania.

And further, that the said special master, making such sale, may,

either personally or by some person to be designated by him to act in his name and by his authority, adjourn the sale from time to time without further advertisement, but only on the request of the complainant or its solicitors or by order of the court or a judge thereof.

It was further ordered, adjudged and decreed, that the said special master shall accept no bid for said property less than thirty-five thousand dollars ($35,000.00); that in case such amount above required shall not be bid therefor, the special master shall adjourn the sale and shall apply to the court for further instructions; that the purchaser, when the property is struck down to him, shall at once pay the special master ten per cent. of the amount of his bid, on account of his purchase, but in no case shall such deposit be less than the sum of five thousand dollars ($5,000.00) in United States currency, or in such certified draft, certificate or cheque as may be satisfactory to the said special master; that should he fail to make such payment at once, the mortgaged property and premises so directed to be sold shall be resold, the court reserving the right to consider such resale as made on account of said proposed purchaser, or as an original sale, but such sale, under such circumstances, shall be made at once and without further advertisement; and that the deposit received from the successful bidder shall be applied
195 on account of the purchase price; and that such further portions of the purchase price shall be paid in cash as the court may from time to time direct, the court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its or their successors or assigns, to comply within twenty days with any order of the court in that regard; and that the balance of the purchase price may be paid either in money or in bonds, or overdue coupons secured by said mortgage of said defendant, The Pennsylvania Plate Glass Company, to the complainant, each said bond and coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered, and according to the priority herein adjudged.

It was further ordered, that William R. Blair, Esq., be, and he hereby is designated and appointed a special master, to make the sale hereby ordered and decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof, on the order of the court, or of a judge thereof, confirming such sale; the court, however, reserving the right, in term time, or at chambers, to appoint another person such special master, with like powers, in case of the death or disability to act of the special master hereby designated, or in case of his resignation or failure to act, or removal by the court.

It was further ordered and decreed, that within thirty days from the confirmation of said sale or sales, or such further time as the court may allow, on application of the purchaser for good cause shown, the purchaser or purchasers of said property shall complete payment of the entire amount bid to the said special master; and that on such payment, the said purchaser or purchasers shall be

entitled to receive a deed of conveyance thereof from the said special master, (and from the other parties to this cause as herein provided), and to receive possession of the property so purchased from the parties holding possession of the same.

196 It was further ordered and decreed, that the fund to arise from the said sale, together with the said three hundred dollars received by the complainant at the time of the release hereinbefore described, shall be applied as follows:

(1.) To the payment of all proper expenses attendant upon said sale, including the expense, outlays and compensation of the special master to make said sale, as such expense, outlays and compensation may be hereafter fixed and allowed.

(2.) To the payment of the costs of this suit under the original bill herein, including the expenses incurred in taking care of the mortgaged property under the interlocutory orders herein, and a compensation to the care-taker heretofore appointed by the court herein, for his services, as said expenses and compensation may be hereafter fixed and allowed by this court.

(3.) To the payment of the compensation of the complainant herein for its services, charges and expenses in the execution of its trust under said mortgage so made to it as aforesaid, including its own compensation and commissions and its disbursements for solicitors' and counsel fees in the execution of said trust, as such charges, expenses and compensation may be hereafter fixed and allowed by this court.

(4.) To the payment of the bonds and coupons of the defendant, The Pennsylvania Plate Glass Company, secured by the mortgage foreclosed hereby, with interest thereon, or if the fund be not sufficient to pay the same, then to the payment of same *pro rata*; that each of the said bonds presented to the special master shall, if the holder thereof shall so request, be stamped or endorsed in some way by said special master, so as to show the amount that has been paid on account of the same, and on account of the coupon interest due thereon, and be returned so stamped or indorsed to the holder thereof; that in case of payment in full of said bonds and coupons,

197 with interest thereon, the same shall be delivered with payment in full stamped thereon by the special master to the purchaser or purchasers at the sale, to be held by said purchaser as a muniment of title; and

(5.) If, after making all the above payments, there shall be any surplus, the same shall be paid according to the further order of court in that regard.

It was further ordered, adjudged and decreed, that the defendants, W. L. Kann and the Penn Plate Glass Company and the plaintiff, The Farmers' Loan and Trust Company, be and they are hereby authorized and directed to execute and deliver, under the direction of the special master making such sale, conveyances executed by them respectively by way of confirmation and further assurance of title to the said purchaser or purchasers, his, its or their assigns, of all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, and wherever

situated, hereby directed to be sold by the said special master, and that the form of said conveyance and mode of execution thereof shall be settled and approved by the court or a judge thereof, if any question should arise as to the form and sufficiency thereof; and that such conveyances shall be delivered to said purchaser or purchasers, his, its or their assigns, contemporaneously with the deed or deeds of the said special master.

And it appearing to the court that the defendant, The Penn Plate Glass Company, has procured a very large amount of insurance upon said mortgaged premises and property, and that a very large amount of such insurance has been collected by reason of said destruction by fire of a part of said mortgaged premises and property, and that the complainant, as trustee under said mortgage hereby foreclosed, was entitled to an equitable first lien upon the said insurance and insurance moneys to the extent of all valid outstanding bonds secured by said mortgage; and it further appearing to the court that under an interlocutory order entered herein,
198 Emanuel Wertheimer was appointed receiver herein of said insurance moneys, and that a very large part of said insurance moneys was collected by said Wertheimer as such receiver, and that under the terms of said interlocutory order said Wertheimer was directed to hold as such receiver one hundred and twenty-five thousand dollars of the insurance moneys so collected, and, if it should be finally decreed that the complainant herein had an equitable lien upon said insurance moneys, then to pay over to the complainant so much of said sum as should be necessary to pay and discharge the ninety thousand dollars of said bonds, other than the one hundred and fifty thousand dollars of said bonds belonging to said Wertheimer and deposited with the Farmers' Deposit National Bank, as to which last-named bonds said Wertheimer had released and waived all claim to an equitable lien upon said sum of one hundred and twenty-five thousand dollars, so collected and held by him, and also to pay and discharge the coupons upon the said ninety thousand dollars of said money, and the costs, charges and expenses of this suit.

It was further ordered, adjudged and decreed, that the complainant as trustee under said mortgage has, and is entitled to, such equitable first lien upon said insurance moneys.

And it was further ordered, adjudged and decreed, that the said Wertheimer, as such receiver, shall pay, without further order, out of the said one hundred and twenty-five thousand dollars of insurance moneys, all the costs, charges and expenses of this suit under the supplemental bill herein; and if the proceeds of said sale of the mortgaged property and premises hereinbefore directed to be made as augmented by the said three hundred dollars received at the time of said release, shall not be sufficient to pay all the said costs, expenses, fees and compensations hereinbefore directed to be paid out of said proceeds of sale added to said three hundred dollars, and the full amount of said mortgage debt, as hereinbefore fixed
199 and determined, with interest on said debt from the date hereof, that then the said Wertheimer, as such receiver, shall

without further order, pay and discharge out of said one hundred and twenty-five thousand dollars of insurance moneys, an amount sufficient to pay and discharge the unpaid balance of said expenses, costs, fees and compensations, if any, and also any deficiency, after the application of the proceeds of said sale and said three hundred dollars as aforesaid, which may remain due on the said ninety bonds not owned by said Wertheimer, and on the coupons thereof, and interest on the said bonds and coupons as fixed and determined in the manner hereinbefore specified, with interest from the date hereof, all such payments to be made in the manner and to the persons hereinbefore specified in regard to payments out of the said proceeds of sale and said three hundred dollars; and if, upon making such payments, there shall remain in the hands of said Wertheimer any balance of said one hundred and twenty-five thousand dollars, that then said Wertheimer shall forthwith pay over the same to the said Penn Plate Glass Company without further order.

It was further ordered and decreed, that in case there shall be any deficiency upon the amount of the entire mortgaged debt, as fixed in the manner hereinbefore specified, with interest thereon from the date hereof, after making the payments hereinbefore provided, all damages and moneys which may be due and be paid from and by said Pennsylvania Railroad Company by virtue of the said taking and condemnation of a part of the mortgaged property as hereinbefore recited, shall be applied (1), to the payment of the costs, expenses and charges of the complainant incurred in the said condemnation proceedings, or in any other proceeding taken for the purpose of collecting such damages, including its own compensation and a reasonable fee for its counsel, for their services in said condemnation or other proceedings, as the same may be fixed; and (2), to the payment of such deficiency on the entire mortgage
200 debt, with interest thereon, in full, if the said damages and moneys are sufficient, and, if they are not sufficient, then to the payment of the same *pro rata*, any part of the said mortgage debt which may still remain due and unpaid upon the said ninety bonds not owned by said Wertheimer as hereinbefore recited, and the coupons thereon and interest on the same, to participate *pro rata* with the balance of the said mortgage debt in the said distribution of said damages and moneys so collected by reason of said taking and condemnation. And the defendants the said Penn Plate Glass Company and W. L. Kann are hereby ordered and directed to pay to the complainant herein, without further order of this court, such amount of said damages arising from said condemnation of said mortgaged premises and property which may be paid to them, or either of them, as may be necessary to pay (1), said costs, expenses and compensation; and (2), any deficiency which may remain upon said entire mortgage debt, with interest, as aforesaid. If after making the above payments there shall remain any surplus of the said damages and moneys so to be collected from said railroad company, the same shall be paid to the Penn Plate Glass Company.

It was further ordered, that any party to this proceeding may

apply to the court for further orders and directions at the foot of this decree.

BY THE COURT.

*Stipulation.*

It is hereby stipulated by the complainant herein that should any appeal be taken from the decree herein, which directs a foreclosure sale and awards an equitable lien upon the insurance moneys in favor of the complainant by the defendants, The Penn Plate Glass Company and W. L. Kann, or either of them, the complainant will not oppose such appeal upon the ground that the decree, or any part thereof, is not final, but consents that upon such appeal
201 the case, to the extent covered by such appeal, shall be heard upon its merits as fully as though an order had been made directing the immediate payment of the insurance fund to the complainant.

Dated New York, August 1st, 1899.

J. S. & E. G. FERGUSON,
TURNER, McCLURE & ROLSTON,
*Solicitors for Complainant.*
S. SCHOYER, JR.,
S. B. SCHOYER, JR., *For Defendants.*

*Petition for Appeal.*

To the honorable the judges of the circuit court of appeals for the third circuit:

The petition of The Penn Plate Glass Company, one of the defendants herein, respectfully shows:

That it considers itself aggrieved by the decree of the circuit court of the United States for the western district of Pennsylvania, entered in the above cause on the 25th day of July, 1897, and it hereby appeals to the United States circuit court of appeals for the third circuit from that portion of said decree impressing an equitable lien in favor of the Farmers' Loan & Trust Company, trustee, of the proceeds of certain insurance policies taken out by the Penn Plate Glass Company, and ordering that a certain portion thereof now in the hands of the receiver of such insurance be paid as in said decree provided, and for the purposes therein mentioned, and prays that such portion of the decree be wholly reversed and set aside, and files herewith the following assignments of error:

202 *Assignments of Error.*

First. The court erred in decreeing that the complainant as trustee had and is entitled to an equitable lien upon the insurance moneys in the hands of the receiver appointed by the court to collect and receive such insurance moneys.

Second. The court erred in decreeing as follows, namely:

"That if the proceeds of said sale of the mortgaged property and

premises hereinbefore made to be directed as augmented by the said $300 received at the time of said sale shall not be sufficient to pay all the costs and expenses and compensation hereinbefore directed to be paid out of said proceeds of sale, added to the said $300, and the full amount of said mortgage debt as hereinbefore fixed and determined, with interest on said debt from the date hereof, that then said Wertheimer as such receiver shall without further order pay and discharge out of said $125,000 of insurance moneys an amount sufficient to pay and discharge the unpaid balance of said costs, fees and compensations, if any, and also any deficiency after the application of the proceeds of the said sale and said $300 aforesaid which may remain due on the said ninety bonds not owned by said Wertheimer and on the coupons thereof and interest on said bonds and coupons as fixed and determined in the manner hereinbefore specified, with interest from the date hereof; all such payments to be made in the manner and to the persons hereinbefore specified in regard to payments out of the said proceeds of sale and said $300."

Third. The court erred in decreeing that the said receiver, Wertheimer, should pay out of the said insurance moneys in his hands an amount sufficient to discharge and pay the ninety bonds, with interest thereon, in case there should be any deficiency after a sale of the mortgaged premises.

Fourth. The court erred in finding that certain policies of
203 insurance which had been taken out by the Pennsylvania Plate Glass Company and maintained by its receiver, were in force when W. L. Kann purchased the mortgaged property, and that said policies were turned over to the said Kann and he was informed by the receiver that they were outstanding and the same were by him allowed to lapse.

Fifth. The court erred in finding that at the time of the filing of the original bill in this cause, and the application by the complainant for a receiver of the mortgaged premises, the Penn Plate Glass Company and W. L. Kann agreed to place insurance upon the property for the benefit of the trustee, said finding of fact being as follows:

"That the question of insurance arose during the pendency of the application for a receiver, and thereupon counsel for W. L. Kann and the Penn Plate Glass Company signified their willingness to place insurance upon the property for the benefit of the trustee if they were bound to do so, but denied their liability to so do."

Sixth. The court erred in making the following finding of fact:

"That subsequently (namely, after the application aforesaid) they (the Penn Plate Glass Company and Kann), did place a large amount of insurance upon the property, and this insurance was placed by a party to this litigation under the stress of an application for the appointment of a receiver and a consequent exclusion from possession, and that said insurance was placed in pursuance of that agreement, and in response to a demand upon these parties to insure made by the counsel for the trustee at the time of the application for a receiver."

Seventh. The court erred in finding as a fact that the personal guaranty signed by Kann and Wertheimer as individuals constituted an agreement on the part of the Penn Plate Glass Company to insure for the benefit of the complainant as trustee, said finding being as follows:

"That the Penn Company at this time, namely, the time
204 of the application for a receiver, 'procured to be signed a guaranty signed by W. L. Kann' (the president of the company) and Emanuel Wertheimer, (a stockholder) during the pendency of the motion, condition-'that in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there should be paid to the said Farmers' Loan & Trust Company, trustee, in trust for the holders of valid bonds secured by the mortgage, a sum equal to the total amount of such valid bonds out of policies of insurance existing in favor of the Penn Plate Glass Company; provided that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of said property, is bound or liable by anything contained in said mortgage or the terms of its purchase of the described mortgaged premises, to keep or maintain insurance for the benefit of the holders of bonds secured by said mortgage.'

"And it is further provided that in the event of a loss by fire and the insurance money in that event is applied to the restoration of the plant of the Penn Plate Glass Company bound by said mortgage, that then this obligation shall be null and void, without prejudice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain policies of insurance on the said plant at any time for the benefit of the holders of valid bonds secured by the mortgage;

"And it is further distinctly understood and agreed that in the event of partial losses and partial restoration, the amount of the insurance money applied thereto shall be a credit on the amount for which we have become bound."

Ninth. The court erred in the following finding of fact:

"That after the loss it appeared in the insurance placed that the Penn Plate Glass Company and W. L. Kann, its president, had placed a provision therein in terms excluding the bondholders from any interest in the policies."

205 Tenth. The court erred in finding as a fact that said provision was placed in said policies without the knowledge of the court or trustee, said finding being as follows:

"That this was an act *inter alios acta;* the trustee and the court had no knowledge of it, and it can in no way affect the legal or equitable status and rights of the parties before the court."

Eleventh. The court erred in the following conclusions of fact and law based upon the findings of fact, namely:

1. That the Penn Plate Glass Company was estopped to deny that the insurance in question was placed in pursuance of its duty to insure for the benefit of the bondholders or their trustee.

2. That being bound to insure for the benefit of the trustee by force of its purchase subject to the mortgage, Kann had also secretly

and wrongfully allowed to lapse and failed to maintain the policies of insurance taken out by the Pennsylvania Plate Glass Company and maintained by its receiver and which were in force and turned over to Kann at the time of its purchase, and therefore any subsequent insurance placed by him would inure to the benefit of the bondholder.

3. That this applied equally to any insurance effected subsequently by the Penn Plate Glass Company, because Kann had organized it, was its president, and, therefore, it was simply Kann under another name, it had notice, and was bound by Kann's act in the premises.

4. That the insurance in question was placed in pursuance of an express promise made by Kann and the Penn Company to insure for the benefit of the trustee, subject to a judicial determination of their liability to do so at the time of the application by the trustee for a receiver when the original bill was filed, and — pursuance to a demand made by the trustee in court at that time, and under
206 the stress of an application for the appointment of a receiver, and consequent exclusion from possession.

5. That this promise to insure was evidenced by a guaranty filed during the pendency of the motion for the receiver, signed by Kann, the president of the company, and Emanuel Wertheimer.

6. That the Penn Plate Glass Company, pursuant to this promise, having subsequently placed a large amount of insurance on the mortgaged property, it was found subsequently that it had surreptitiously and without the knowledge of the court or trustee, placed a clause in the policies excluding the trustee and bondholders from any interest therein, and that this provision being a nullity, is *res inter alios acta*, the insurance placed would be regarded as placed pursuant to that agreement, notwithstanding said clause, and the fact that it was taken out solely to cover the interest of the Penn Plate Glass Company.

7. The court further erred in finding as a matter of law that it was the duty of the Penn Plate Glass Company to insure for the benefit of the trustee.

8. The court further erred in finding as a matter of law that the purchase by the Penn Plate Glass Company, subject to the mortgage, constituted a covenant to indemnify the mortgagor company against its covenant to insure.

9. The court erred further in finding as a matter of law that because the trustee could have foreclosed and taken possession on account of the breach of the Penn Plate Glass Company to insure, that, therefore, it became the duty of that company to insure for the benefit of bondholders.

Twelfth. The court further erred in finding that because it could have ordered the Penn Plate Glass Company to insure for the benefit of the trustee at the time of the filing of the original bill and the application for the receiver, that, therefore, it could impress an equitable lien upon the insurance fund in question.

207 Thirteenth. The court further erred in finding that the position of the parties had not changed since the time of the application for a receiver.

Fourteenth. The court erred further in its opinion, finding as follows:

"That if the insurance goes to the bondholders, it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it never paid, to wit, $250,000, representing deferred purchase-money. They, the purchasers, paid some $83,000 for the property. They insured it for more than $300,000, and now on the destruction of the property which was the substantial security for $250,000, being the trustee, they seek to avoid the payment of the $250,000 and to realize on the $83,000 paid by them upwards of $300,000 in insurance upon property for which they never paid."

"The allowance of such a result under the facts would be wholly inequitable, for it is a principle of equity that, in a contest between one who is seeking to make a gain and one who is seeking to avoid a loss, equity will rather lean toward him who has actually lost than to him who merely seeks to gain."

Fifteenth. The court below further erred in finding as a fact that the Penn Plate Glass Company paid only $83,000 for the mortgaged property.

Sixteenth. The court further erred in finding that the insurance effected by the Penn Plate Glass Company was more than the fair value of its own interest exclusive of the mortgage debt, and that the said company would speculatively gain the amount of the insurance if it should be awarded the fund.

Seventeenth. The court further erred as a matter of law in finding that the purchase of the mortgaged property by the Penn Plate Glass Company, subject to the mortgage, constituted a contract to indemnify the mortgagor against the payment of the mortgage debt.

208 Eighteenth. The court further erred in not finding that there was no covenant or provision in the mortgage requiring the mortgagor to insure for the benefit of the bondholders.

Nineteenth. The court further erred in finding that there was any personal liability on the part of the mortgagor or the Penn Plate Glass Company to pay the mortgage debt or to insure for the benefit of the bondholders.

Twentieth. The court further erred in finding that the mortgage itself, by its own terms, did not exclude any personal liability for the mortgage debt upon the part of the mortgagor.

Twenty-first. The court further erred in holding that the act of assembly of the Commonwealth of Pennsylvania of June 12th, 1878, did not include any liability on the part of the mortgagor to pay the mortgage debt, or on the part of the Penn Plate Glass Company to pay the mortgage debt or to insure for the benefit of the trustee.

Twenty-second. The court further erred in finding as a matter of law that there was any contract, express or implied, upon the part of the Penn Plate Glass Company to insure for the benefit of the trustee or its *cestui que trust*.

Twenty-third. The court further erred in finding as a matter of law that the Penn Plate Glass Company *any* was estopped by contract on its part from asserting that the insurance taken out by it for its own benefit belonged to the said trustee.

Twenty-fourth. The court further erred in finding as a matter of law or fact or as a matter of mixed law and fact, that the trustee was entitled to any lien upon the insurance in question.

Twenty-fifth. The court erred in not finding that the insurance fund in question was taken out for its own benefit with the full knowledge of and notice to the trustee that such was the case,
209 an that said insurance fund belonged to the Penn Plate Glass Company free of and unaffected by any lien in favor of the trustee.

Twenty-sixth. The court erred further in not ordering the receiver to pay over said insurance fund to the Penn Plate Glass Company without any deduction for payments to be made to the trustee thereout.

Twenty-seventh. The court further erred in its decree allowing interest upon unpaid coupons of the bonds secured by the said mortgage.

Twenty-eighth. The court further erred in not dismissing the original bill as against W. L. Kann.

Twenty-ninth. The court erred in not dismissing the supplemental bill as against W. L. Kann.

S. SCHOYER, JR.,
S. SCHOYER,
*Attorneys for Appellants.*

*Bond.*

Know all men by these presents, that we, Penn Plate Glass Company and Emanuel Wertheimer, are held and firmly bound unto the above-named The Farmers' Loan & Trust Company of New York in the sum of one thousand dollars, to be paid to the said The Farmers' Loan & Trust Company of New York, its successors and assigns, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Witness the corporate seal of Penn Plate Glass Company, attested by the signature of Emanuel Wertheimer, vice-president, and the hand and seal of Emanuel Wertheimer, this 2d day of August, 1899.

Whereas, the above-named Penn Plate Glass Company have taken an appeal from the decree of the court below in the above-entitled cause to reverse the decree entered therein so far as the same *are* covered by assignments of error filed in the court below upon the allowance of said appeal:

210 Now, therefore, the condition of this obligation is such that if the above-named Penn Plate Glass Company shall prosecute its said appeal to effect and answer all damages and costs, then

this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PENN PLATE GLASS CO., [SEAL.]
By EMANUEL WERTHEIMER,
*Vice-President.*
EMANUEL WERTHEIMER. [SEAL.]

Witness:
W. T. McCLARREN,
*Assistant Secretary.*

*Citation.*

UNITED STATES OF AMERICA,
*Western District of Pennsylvania.*

To the Farmers' Loan and Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the third circuit, to be holden at Philadelphia, in said circuit, on the 31st day of August, 1899, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein The Pennsylvania Plate Glass Company, The Penn Plate Glass Company, and William L. Kann are appellants and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Witness my hand this 9th day of August, A. D. 1899.
JOS. BUFFINGTON, *Judge.*

Service of the above citation is hereby accepted this 11th day of August, A. D. 1899.
J. S. & E. G. FERGUSON,
*Attorneys for Appellee.*

211 & 212 *Certificate.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 26th day of Aug., A. D. 1899.

[SEAL.] H. D. GAMBLE, *Clerk.*

213 United States Circuit Court of Appeals for the Third District, September Term, 1899.

PENN PLATE GLASS COMPANY, Appellant,
*vs.*
FARMERS' LOAN AND TRUST COMPANY, Trustee. } No. 19.

And afterwards, to wit, on the ninth day of October, A. D. 1899, this case being called for argument on the transcript of record from the circuit court of the United States for the western district of Pennsylvania, before the Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards, to wit, on the twelfth day of March, A. D. 1900, the court entered the following order, viz:

*Per Curiam:* A reargument of this case is ordered, the same to take place at the present term of the court, and the clerk is directed to put the case at the foot of the present argument list and to give immediate notice of this order to counsel by delivering or mailing to them a copy thereof.

And afterwards, to wit, on the nineteenth day of March, A. D. 1900, the following order was entered:

PENN PLATE GLASS COMPANY
*vs.*
FARMERS' LOAN AND TRUST COMPANY.

Before Acheson, Dallas, and Gray, circuit judges.

*Per Curiam:* Mr. Schoyer, of counsel for the appellants, in open court having asked upon what particular points the court desired to hear counsel the following addition is made to the order for reargument, viz:

The court desires to further hear counsel upon the subjoined questions:

214 1. Whether there was under the provisions of the mortgage, obligation upon the mortgagor, arising from express covenant or otherwise, to insure and keep insured the mortgaged premises for the benefit of the mortgagor or bondholders?

2. Whether the Penn Plate Glass Company came under an obligation to insure for the benefit of the trustee, or an obligation to indemnify the mortgagor against its liability to insure, if such liability existed?

3. Whether, in any aspect of the case, the fund derived from the insurance which was in fact made, is one to which the trustee is entitled?

And afterwards, to wit, on the twelfth day of April, A. D. 1900, this cause being called for reargument before the Hon. M. W. Ache-

son, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties and the court not being advised in the premises takes further time for consideration thereof.

And afterwards, to wit, on the fourteenth day of June, A. D. 1900, come the parties aforesaid, by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion:

Acheson, circuit judge, dissenting.

In the United States Circuit Court of Appeals, Third Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Appellee,
*vs.*
THE PENN PLATE GLASS COMPANY, Appellant; THE PENNSYLVANIA PLATE GLASS COMPANY, and WILLIAM L. KANN.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

GRAY, *J.*:

This is an appeal taken by the defendant, The Penn Plate Glass Company, from a decree rendered by the circuit court of the
215 United States for the western district of Pennsylvania in favor of the complainant, The Farmers' Loan and Trust Company, as trustee, against the defendants.

On January 1, 1891, the Pennsylvaaia Plate Glass Company, a corporation, made a mortgage to the Farmers' Loan and Trust Company, a New York corporation, to foreclose which mortgage the original bill herein was filed. The mortgage covered the plant of the mortgagor company, being a specified tract of land in Irwin, Westmoreland county, Pennsylvania, with certain gas and water contracts, and all the company's other property, real or personal, then owned or thereafter to be acquired, including rents, issues and profits. (Record, vol. 1, pp. 18–39.)

This mortgage was given in trust to secure six per cent. bonds which were issued to the amount of $250,000 of principal.

On the 19th of March, 1894, a suit was brought in the court of common pleas of Westmoreland county, at the instance of the directors, against the Pennsylvania Plate Glass Company to procure its judicial dissolution. In that suit Joseph W. Stoner was on that day appointed receiver of the company. An order was subsequently made for the sale of the property by the receiver, subject to the lien of the existing mortgage of $250,000. Accordingly on the 18th of June, 1894, the receiver sold the property so subject to the mortgage at public auction. The defendant, W. L. Kann, was the purchaser, the price being $37,500. On July 2, 1894, a deed was, by order of the court, given by the receiver to Kann. It, in accordance with the terms of the order, recited that the conveyance was made "sub-

jected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland county in Mortgage Book 43, page 1."

Kann held this property for about one year, and until July 1, 1895, when by deed of that date, he sold and conveyed it to the Penn Plate Glass Company (one of the defendants herein), a corporation probably organized by Kann himself for the manufacture of plate glass, for $83,000. It is claimed by Mr. Kann and the appellant company, that in addition to the consideration named in the deed, expenditures for improvements placed upon the property amounted to $200,000, and brought the purchase price to the Penn Plate Glass Company up to about three hundred thousand dollars. These figures are disputed by the complainant, but there is no testimony that directly contradicts that of Mr. Kann in this regard. The deed from Kann recited that the property was conveyed "subject to a certain mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of New
216 York for $250,000, dated January 1, 1891, and recorded in Westmoreland county, in Mortgage Book 43, page 1." This being the mortgage in question.

While Mr. Kann held the title to the property, he paid the interest coupons on the bonds maturing during his ownership; but those maturing July 1, 1895, the time of the purchase by the Penn Plate Glass Company, were not paid by that company and no coupons have been paid since.

The Farmers' Loan and Trust Company, in pursuance of the provisions of the mortgage, then declared the principal of the mortgage due, and on July 8, 1896, filed the original bill in this case to foreclose the mortgage, against the Pennsylvania Plate Glass Company (the mortgagor), W. L. Kann and the Penn Plate Glass Company. Kann and the Penn Plate Glass Company put in answers, contesting the right to foreclose, on the ground that the mortgage itself was invalid, except as to such of the bonds thereby secured as were held by purchasers for value without notice, and averring that the requisite number or bondholders had not requested such action, and that such request was a condition precedent under the provisions of the mortgage. The Pennsylvania Plate Glass Company, the mortgagor, put in no answer, and its receiver, Stoner, was not made a party to the bill.

About the time of filing this original bill, namely, on July 16, 1896, the plaintiff made a motion for the appointment of a receiver of the mortgaged premises. This was refused; but after the court had announced its decision, counsel for complainant mentioned the fact that there was no insurance on the property for the benefit of the bondholders and that they would be unprotected in case of a loss by fire. Thereupon counsel for defendants expressly denied that either the Penn Company or Kann was bound to insure for the benefit of bondholders, either by virtue of anything contained in the mortgage or the terms of their purchase. Counsel for com-

plainant insisted that they should have insurance, whereupon the court below said: "I can't decide that question," and intimated to defendants that, if they were bound to insure, they ought to protect complainants. They denied still that they were bound to insure, but W. L. Kann and Emanuel Wertheimer, who were stockholders in the Penn Company, agreed to give their individual bond or agreement (see Record, vol. 2, pp. 92, 93), that out of the then existing policies of insurance, which had been previously taken out by the Penn Company, there should be paid out to the Farmers' Loan and Trust Company, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such lot of bonds. This stipulation was entered into, and approved by the court and filed, and contained this proviso: "Provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property is bound or liable by anything contained in the said mortgage, or the terms of its
217 purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage."

The insurance referred to in the above instrument had been placed a long time prior to both the filing of the original bill and the application for a receiver. When Kann became the purchaser of the property, at judicial sale, in 1894, he made contracts of insurance to the amount of about $450,000, covering only his interest in the mortgaged property, and expressly excluding the interest of the bondholders by the following clause in all the policies, namely:

"This property is subject to a mortgage of $250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders."

When the Penn Plate Glass Company, a year later, purchased the property, the insurances were perfected with the same clause excluding the interest of the bondholders.

At or about the time Kann purchased and insured the property as aforesaid, the Farmers' Loan and Trust Company notified Kann to insure for the benefit of the bondholders, in reply to which Kann notified that company in writing that he refused to so insure, and that the existing and future insurance was and would be for his own benefit and not for the benefit of the bondholders. Similar demands were made upon the Penn Plate Glass Company at the time of its purchase and similar replies made by it thereto. These demands and refusals occurred about two years prior to the filing of the original bill, in July, 1896, and have continued and been persisted in ever since, and were reiterated at the time of the application for a receiver under the mortgage foreclosure suit.

No further action was taken by the trustee, either to insure itself or to procure its bondholders to do so, or to compel the Penn Company or Kann to do so; and matters in this respect remained in *statu quo* for nearly three years; when, on April 12, 1898, and before the determination by the court of the issues raised by the original bill, a large part of the plant of the Penn Company was destroyed by fire.

Thereupon the Farmers' Loan and Trust Company filed its supplemental bill claiming an equitable lien on the insurance money held by the Penn Plate Glass Company to the extent of its loss, and asking that the insurance companies be restrained from paying the insurance monies to the Penn Company, but that they pay the same to the Farmers' Loan and Trust Company, as trustee for the bondholders, basing its equitable right to relief on the following grounds, namely:

(*a*.) That the clause in the mortgage relating to insurance constituted a covenant on the part of the mortgagor company, the Pennsylvania Plate Glass Company, to insure for the benefit of
218 bondholders. The clause referred to contains the only provision in the mortgage relating to insurance. (See printed copy of mortgage, page 35 of record of original bill.)

(*b*.) That in pursuance of this provision, the mortgagor company, the Pennsylvania Plate Glass Company, did place insurance for the benefit of the bondholders and did maintain the same up to the time of its insolvency and the appointment of Stoner as receiver.

(*c*.) That the receiver, under the directions of the court of Westmoreland county, maintained this insurance until the property was knocked down to Kann at receiver's sale.

(*d*.) That Kann, upon his acquisition of the mortgaged property, with full knowledge of the covenant to insure and of the foregoing facts, allowed this insurance to lapse, and in spite of repeated demands by the trustee, refused to insure for the benefit of the bondholders, and has since persisted in this refusal.

(*e*.) That Kann had identified himself with the mortgagor company, advanced money to it, knowing it to be insolvent, and by his acts in connection thereto, had brought about the receivership and wrecked the company, and that he had bought the property for $37,500.

(*f*.) That the said Kann, having thus purchased the property subject to the mortgage, was, under the foregoing circumstances bound to insure for the benefit of the bondholders.

(*g*.) The bill further alleged that the Penn Plate Glass Company was also bound to insure, and stood in the shoes of Kann, because:

1. It had been organized by Kann for the express purpose of purchasing from Kann the mortgaged property and operating the same; and because Kann was the president and principal stockholder therein and therefore, was affected with notice of all the foregoing facts and circumstances concerning the previous insurance, as well as of the covenant to insure.

2. That the trustees, upon the purchase by the Penn Company, notified it in writing upon December 1, 1895, to insure for the benefit of the bondholders, but in response thereto that company had notified the trustees in writing of its refusal so to do, and had persisted in this refusal ever since, although repeated demands had been made upon it to this effect. The above demand was first made nearly a year before the filing of the original bill.

3. That the Penn Plate Glass Company had interposed a frivolous defense to the original bill and delayed the proceedings thereunder,

thereby preventing the foreclosure and sale which would otherwise have taken place before the occurrence of the fire.

4. That the Penn Company, with the full knowledge of the foregoing circumstances, had accepted a deed of the property,
219 subject to the mortgage, and was therefore bound to insure for the benefit of the bondholders.

Upon the filing of the supplemental bill, to which about ninety-five insurance companies were made parties, the court below made an interlocutory decree, appointing Emanuel Wertheimer receiver, to collect the insurance money arising from the existing policies, and to hold one hundred and twenty-five thousand dollars thereof for the benefit of ninety bonds secured by the mortgage (the remaining one hundred and sixty bonds being owned by Wertheimer, who stipulated that the same should not participate in the insurance money), in case it should be decided that the trustee of the bondholders had an equitable lien on such insurance money. The receiver was further directed to pay over all monies over and above the one hundred and twenty-five thousand dollars to the Penn Plate Glass Company.

On February 24, 1898, the court below handed down an opinion overruling the defenses to the foreclosure of the mortgage and finding that the trustee thereof was entitled to an equitable lien on the insurance money previously placed by the Penn Plate Glass Company, and on the 25th of July, 1899, entered a final decree, which, *inter alia*, fixed the amount due on the mortgaged property, ordered the foreclosure thereof and a sale of the mortgaged premises, and found that the value thereof was not sufficient to pay the mortgage debt, and ordered the receiver to pay over so much of the one hundred and twenty-five thousand dollars of insurance moneys held by him as should be necessary to pay in full the ninety bonds entitled to participate therein, after crediting them with their *pro rata* share of the proceeds of the sale of the mortgaged premises.

It is from so much of the decree as awards an equitable lien on the insurance money to the complainant that this appeal is taken, and the appellant has filed in this court twenty-nine assignments of error.

In the view that will be taken by the court, it is not necessary to consider these assignments separately, as they may all be disposed of in the consideration of three questions which underlie them. These questions are:

First. Was there, under the terms of the mortgage, an obligation upon the mortgagor, arising from express covenant, or otherwise, to insure and keep insured the mortgaged premises for the benefit of the mortgagee?

Second. If the preceding question is answered in the affirmative, then, whether the Penn Plate Glass Company, by becoming the grantee of the equity of redemption, subject to the mortgage, thereby came under an obligation to insure for the benefit of the trustee, or such an obligation to indemnify the mortgagor against its liability to insure (if such liability existed) as would be available to the mortgagee and complainant in this suit?

220 Third. Even if the preceding question, in both its branches be answered in the negative, whether there was any equitable obligation resting on the defendants to insure for the benefit of the trustee, growing out of their dealings with this property or growing out of any alleged exceptional facts or circumstances of the case. In other words, whether, as disclosed in this record, such a special state of facts and circumstances exists as would make it incumbent upon a court of equity to infer a right in the mortgagee to a lien on the insurance, or to impress the fund collected by the receiver from the insurance companies with such a lien in favor of the mortgagee and bondholders?

The first question, of course, stands at the very threshold of this case, and unless it can be answered affirmatively, there is no foundation upon which can be erected the equitable obligation on the part of the defendants, one or both, or the equitable lien upon the insurance fund, paid by the insurance companies to the receiver, as contended for by the complainant below.

This is conceded by counsel for complainant below, but they refer us to the 10th article of the mortgage, as containing such express covenant or stipulation on the part of the mortgagor to insure the mortgaged premises for the benefit of the mortgagee and bondholders. No other part of the mortgage is relied on for this purpose, and here, or not at all must be found the express agreement to insure, from which, and from which alone, the important duties and equitable obligations, claimed as against these defendants, or these funds, must spring.

The second and third paragraphs of the 10th article of the mortgage, in which the language referred to occurs, are as follows (Record, vol. 1, p. 121):

"The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien thereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such pay-
221 ment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust and shall not be answerable in any case for the act or default of any agent, attorney, or employee selected with reasonable discretion; it shall be

entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same."

It requires attentive reading to discover the language in these paragraphs which would give color to the contention of complainant below as to the existence of a covenant therein on the part of the mortgagor, to insure for the benefit of the mortgagee and bondholders. It is upon the words "or require the same to be done," in the last paragraph quoted, the complainant below relies.

These words, in connection with what preceded them, it is contended embody a covenant or stipulation on the part of the mortgagor to insure the mortgaged premises for the benefit of the mortgagee and bondholders, whenever demanded by the mortgagee.

These paragraphs from the 10th article of the mortgage, are obviously concerned with limitations on the responsibilities and obligations of the mortgagee and trustee, to the bondholders. Other articles in the mortgage are concerned with prescribing as between the mortgagor and mortgagee the terms or conditions upon which default or forfeiture of the mortgage may be declared by the mortgagee, and with exempting the mortgagor from personal liability for the debt the mortgage was given to secure, and confining the remedy of the mortgagee to recover the same, to proceedings under the mortgage. Articles containing these stipulations obviously relate to contractual relations between mortgagor and mortgagee. But in the paragraphs quoted, after the operative and conveying and defaulting clauses in the mortgage, which have to do with the relations of mortgagor and mortgagee, we have here in the 10th article, what naturally belongs to such an instrument, viz: a declaration and qualification of the trusts assumed in said mortgage by the mortgagee, as trustee, to the bondholders.

The language employed is not contractual, as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to his *cestuis que trustent*. The mortgagor could have no interest in the duties or responsibilities assumed by the trustee to the *cestuis que trustent*, and the limitations and qualifications put upon those duties and responsibilities so assumed could not affect in any degree the liability of the mortgagor. It seems to us that the court below was in error, in deciding that there
222 was such a covenant or contract between the mortgagor and mortgagee. In support of its conclusions, the court reasons as follows:

"There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, the Pennsylvania Plate Glass Company, in its mortgage enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilling of such requisition upon itself, it imposed it upon no one."

We think the court below was mistaken in this reasoning. It is quite possible that language could be used by one of the parties to the mortgage—the mortgagee and trustee in this case—which did not at all refer to the contract between mortgagor and mortgagee, and which did not go to create "liabilities and obligations" as between the parties to the mortgage; and especially is this so, when we consider that, while the mortgagee in this case bears a contractual relation to the mortgagor, he also bears a fiduciary relation, as trustee, to his *cestuis que trustent*, in some respects quite independent of his relation as mortgagee to the mortgagor, and that it was quite natural and in accordance with usage in such matters that the trustee should attempt to state in the mortgage, with precision, the extent of the trust which he had assumed for the bondholders. To do this, it was not necessary that he should contract with the mortgagor, or that the language employed by him for the purpose should import obligation to or by the mortgagor. But complainant below contends that the natural import of the word "require" is to impose obligation on some one, who in this case could be no one else than the mortgagor.

Let us see if this is so. If the language referred to can have no other interpretation, and if, as the court below says, it "necessarily" refers to an obligation imposed on the mortgagor, then, however unsatisfactory it might be to construe language so vague and indirect into a positive covenant of such value and importance as it is here claimed to be, we would feel compelled to so construe it. But, is such a construction a necessary or even a plausible one? It is, in the first place, to be noticed that the alternative phrase, "or require the same to be done," does not specially refer to the subject of insurance, and is not found in direct connection with the language exempting the trustee from responsibility in that regard. It occurs at the close of an enumeration of a number of things, which the trustee declares it shall not be under obligation to its *cestuis que trustent* to do. So that, it is not the case of the trustee speaking specifically about its exemption from obligation to insure, and saying as to that, it may, in its discretion, insure or require the same to be done, but it is a case where the trustee, having exempted
223 itself from liability in a number of matters, reserves to itself, in a general phrase, the right, if it sees fit, to do any of the enumerated things.

In applying this phrase to the preceding enumeration of things, as to which the trustee claims exemption, we find there are certain acts which refer to an individual performance on its part; as, for example, it is not obliged to "file or record the mortgage," or "renew such mortgage," or "procure further assurance," or "do any act suitable for the continuance of the lien," or "give notice of the existence of the liens," or "effect insurance against fire," or "renew policies of insurance." These are all things to be done or not to be done by itself. Then we have the following: It is not obliged to "keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made." Here is a matter, as to which there is a distinction made between the direct

personal act of the trustee itself, and what it may require another to do, and the language immediately following would seem to have been framed with direct reference to that distinction, so that when the trustee says it "may, in its discretion, do any or all of the matters or things in this paragraph set forth, or require the same to be done," it was to make it applicable, among other things, to the language just referred to in regard to the payment of taxes. The alternative phrase, "or to require the same to be done," makes the whole reservation of authority to the trustee, cover more completely (verbally at least), the preceding enumeration of acts and things as to which it had exempted itself from liability.

Again, it is not without significance that, although among the enumerated exemptions from duty claimed by the trustee, in this tenth article, there is one from the duty of procuring "further assurance," yet we find that there is an express and formal covenant for further assurance, constituting article VI of the mortgage. It is from this apparent that the parties to the mortgage, and their counsel, when they desired to bind the mortgagor, knew how to draft a covenant for that purpose, and that they did not consider the mere allusion to an exemption of the trustee, in the tenth article, in connection with the clause saving the right of the trustee to do the thing from which it was exempted, or require the same to be done, a covenant on the — of the mortgagor. It is also clear that this procuring further assurance having been made the subject of a distinct obligation on the part of the mortgagor, by the covenant in the sixth article, was one of the enumerated acts as to which the alternative clause, "or require the same to be done," might apply.

It is true, that it appears from the record, that the mortgagor company did, after the execution of the mortgage, and until the time it went into the hands of a receiver, take out and maintain a partial insurance for the benefit of the mortgagee, and that the receiver, under the direction of the court of Westmoreland
224 county, Pennsylvania, maintained this insurance till the property was sold by him to Kann. There is some force in the argument, that this was an interpretation of the meaning of the language in the tenth article. But this action of the mortgagor and the receiver cannot amount to the creation of an obligation, which was not expressed in the mortgage, and which would bind a subsequent purchaser, whose obligation extended only to the actual meaning of the terms of the mortgage, not to any construction which the original mortgagor might give them. Besides, the mere taking out of insurance by the mortgagor may well have occurred with an understood absence of contractual obligation, and have been prompted by general notions of propriety, or feelings of benevolence and good will.

If then, there is no original obligation imposed by the mortgage on the mortgagor to insure for the benefit of the mortgagee, there is no foundation on which the argument for a derivative obligation in that regard can rest, and as there is no express contract of the grantee of the equity of redemption to so insure, there is no equitable obligation attaching in this case to the appellant, in respect to the

insurance taken for its own benefit, or equitable lien upon the funds arising therefrom, in favor of the complainant. This conclusion would dispose of the case, as complainant's whole contention for equitable relief sought rests upon the postulate of an express contract of the mortgagor to insure for the benefit of the mortgagee.

Columbia Ins. Co. *vs.* Lawrence, 10 Peters, 507.

1 Jones on Mortgages, sec. 748.

But we do not wish to rest our determination of this case upon the mere ground of the construction of the language of the mortgage. We will, as to what we now have to say, assume that the complainant below is right in its contention that the mortgage does contain an express covenant on the part of the mortgagor to insure the mortgaged premises, when thereto demanded by the mortgagee.

This brings us to the consideration of the second of the questions above stated, viz: whether the Penn Plate Glass Company, by merely becoming the grantee of the equity of redemption, subject to the mortgage, thereby came under an obligation to insure for the benefit of the mortgagee and trustee, or such an obligation to indemnify the mortgagor against its obligation to insure (if such liability existed), as would be available to the mortgagee as complainant in this suit.

As to the first branch of this question, it is to be observed, that "while" (to quote the language of the Supreme Court, in Wheeler *vs.* Ins. Co., 101 U. S., 439, 442) "it is settled by many decisions in this country, that if the mortgagor is bound by covenant, or otherwise, to insure the mortgaged premises for the better security of the mortgage, the latter will have an equitable lien upon the
225 money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed," the equitable lien in such case arises from the unperformed contract between mortgagor and mortgagee. Equity regards as done that which ought to be done. And therefore, if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee, or to assign the same, before or after loss, the fund arising therefrom is clearly within the operation of the fundamental maxim just quoted, because the mortgagor was bound to so fulfill his promise to the mortgagor as that funds arising from insurance effected by the mortgagor should belong to the mortgagee, at least to the extent of his, the mortgagee's, interest in the property insured. This promise, or executory contract, equity will enforce, by impressing such funds with a lien in favor of the mortgagee, whether in the hands of the mortgagor, his heirs, executors, or administrators, the insurance company, or voluntary assignees of said funds, or purchasers, or encumbrances thereof, with notice. Walker *vs.* Brown, 165 U. S., 654, 664. Pomeroy's Eq. Jur., vol. 3, sec. 1233.

But apart from cases of fraud, it is only when there is such a contract or promise, which can be so enforced, that courts of equity will recognize for that purpose the existence of an equitable lien. In such case, the lien is impressed upon funds or property, which, be-

longing to the promisor, were the very funds or property which constituted the subject-matter of the contract, or to which the contract or promise related. It is essential, therefore, that the funds or other property, which are to be charged with the lien, should have, either at the time of the contract, or afterwards, and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or of others who may be affected with notice. There must, therefore, exist a contract by the party, owning, either *in presenti* or in expectancy, the property sought to be charged, which directly, or by necessary implication, expresses the intention to charge such property with the lien, in favor of the other party to the contract. These requisites to the establishment of an equitable lien, are clearly recognized by the Supreme Court in the late case of Walker *vs.* Brown, 165 U. S., 654, 664. The court in that case quote and adopt the language of the supreme judicial court of Massachusetts, in Pinch *vs.* Anthony, 8 Allen, 536, as follows:

"It is well settled, that a party may, by express agreement, create a charge or claim in the nature of a lien on real, as well as on personal, property, of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give, but also against third persons, who are either volunteers, or who take the estate on
226 which the lien is agreed to be given with notice of the stipulation." The Supreme Court go on to say: "The subject was very fully reviewed with reference to the English and American authorities in Ketchum *vs.* St. Louis, 101 U. S., 306, where the language just cited was approved and that ruling was considered and reaffirmed, during this term, in Fourth Street Bank *vs.* Yardley, *ante* 634. Pomeroy, in his work on Equity Jurisprudence (vol. 3, par. 1235), condenses and states the general result of the authorities on the subject as follows:

"The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. * * * The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'equity regards as done that which ought to be done.'"

We have dwelt upon these requisites to the establishment of an equitable lien, so that the lien of the mortgage upon the money due upon a policy taken out by the mortgagor, where the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the benefit of the mortgagee, may be distinguished from the lien

claimed by the complainant in the present case. No such lien as has been just described, exists, or could exist in favor of the mortgagee, the complainant in this case, as against Kann or the appellant, on the insurance funds belonging to them, or either of them. It is not pretended that there was any contract between Kann, or the appellant company, and the complainant, to insure for its benefit, or any promise or declaration of intention upon any, or no, consideration, that they, or either of them, would so insure, or that policies or funds arising therefrom should be assigned or charged, with a lien in its favor. The first essential requisite to an equitable lien, as above described, is therefore entirely wanting. There is no contractual relation of any kind between the mortgagee and the appellant, in whose name, and for whose sole benefit these policies of insurance were taken out. If such a lien, therefore, exists on these insurance funds, in favor of the complainant, it must be on other grounds than these ordinary and well-understood ones. This is not the case of a mortgagee, claiming an insurance taken out by the mortgagor, who had covenanted to insure for the benefit of the mortgagee; nor is it the case of such mortgagee claiming such insurance funds, when they had come into the hands of third per-
227 sons "who are either volunteers, or who take the estate (the insurance funds) on which the lien is agreed to be given with notice to the stipulation." The complainant does not claim that the funds due on policies taken out by the mortgagor, and which the mortgagor is held to have promised that he would assign to the mortgagee, have come into the possession of the appellant, with notice, and are therefore charged with a lien in favor of the mortgagee. Its claim is, that the grantee of the equity of redemption, having taken the property expressly subject to the mortgage, which contained a covenant on the part of the mortgagor to insure on that ground alone, came either under a direct obligation to insure the premises for the benefit of the mortgagee, or under an obligation to indemnify the mortgagor for his liability under said covenant.

But the property or "estate" which came to the hands of the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court here, however, is asked to impress a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject-matter of a promise on its part.

It is the first branch of the claim above stated, *i. e.*, the alleged direct obligation, that we are now considering. The complainant suggests, but it is not seriously argued, that the mere taking of the equity of redemption, subject to the mortgage, put the grantee thereof in the shoes of the mortgagor, and made him "liable upon any covenants upon which the mortgagor is liable." It practically abandons this proposition, however, by everywhere, throughout its elaborate brief, and under each of the three or four heads of the argument, appealing to alleged special circumstances as supplying the equitable grounds for the relief it seeks.

The argument of complainant's brief on this point, is in substance this: That the mortgage having provided that in case of default for six months or more, in any of the covenants or stipulations of the mortgagor, the mortgagee shall have the right to enter and hold possession of the mortgaged premises, or to foreclose the mortgage; that the mortgagee in this foreclosure suit has in some way asserted that right, by asking for a receiver, which the court denied (though the bill alleges only the default in payment of interest, as the basis of the suit); and that, to use the language of complainant's brief (page 33), its claim "rests on the right of a trustee to enforce the lien of the mortgage for such a breach of the covenant (by entering and holding possession), and our (its) contention is, that under the circumstances above named, the property having been destroyed, the lien of the mortgage is capable of enforcement, and must be impressed on the insurance fund substituted for the lost property."

228 Whatever the force of this argument may be, it at all events distinctly abandons the proposition above referred to, and impliedly admits that no direct liability on the covenant of the mortgagor to insure rested upon these defendants, or either of them, as a consequence of the mere taking of the equity of redemption, subject to the mortgage, but that "under the circumstances outlined," the lien of the mortgage "must be impressed on the insurance fund substituted for the lost property." But why must the lien be so impressed? We have already adverted to the absence of any contract on the part of the defendant, express or implied, or expression of intention by these defendants, or either of them, to which the doctrine of equitable liens would apply. These funds sought to be charged were not funds of the mortgagor, on whom the obligation of the alleged covenant rested, and which, coming into the hands of defendants, with notice, are therefore within the scope and meaning of this doctrine, but they are the funds which have resulted from contracts of insurance, made by these defendants with insurance companies, in their own right, and for the protection of their own interests. The contracts were such as the defendant had a right to make, and the "circumstances" under which the contracts were made, so far from implying any intention on the part of these defendants, or either of them, to make the contract for, or appropriate the funds arising therefrom to, the benefit of complainant, expressly negative such intention in the most positive and explicit terms.

In the first place, it appears from the language of the policies themselves, that they were taken out for the sole benefit of the defendants; and they expressly stated that they did not cover at all the interest of the mortgage; and in the second place, it appears by the testimony, and it is not denied—in fact it is so stated by the complainant—that both the defendants, during the periods of their successive ownerships, on being applied to by the mortgagee to take out insurance in behalf of and for the benefit of the trustee and mortgagee, declined and continued to decline, so often as the request was repeated, coupling their refusal with the statement that no duty or obligation rested upon them so to do. And we find no other cir-

cumstances disclosed by the testimony in the record, that would serve to create a lien on these insurance funds, in favor of the complainant in the absence of any contract or undertaking on the part of the defendants to so appropriate them. It is hard, under these circumstances, to see that these particular funds were any more subject to a lien in favor of complainant, than funds of the defendants on deposit with its bankers, or moneys coming to it from any other source. Equity will, under some circumstances, enforce the performance of a contract, or of a duty growing out of a contract, through the indirect methods of the recognition of an equitable lien or assignment, but it will not in the absence of fraud create the
229 duty or obligation independently of a contract, expressed intent or will, at some time entered into or declared by the party sought to be charged.

So far, then, we must conclude that, the implied contract arising from the words "subject to the mortgage," is simply and solely a contract between the grantor and grantee of the equity of redemption, and can have no greater or other effect, at the most, than an express contract on the part of the grantee with the grantor, to pay the mortgage debt, and that this contract must be measured by its own terms; that such an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage, except those which run with the land, and those would be binding on the purchaser, irrespective of any contract to pay the debt. As it is conceded that the alleged contract to insure in this case does not run with the land, an obligation to pay the mortgage debt on the part of the grantee of the equity of redemption, if any such exist, of itself imposes no obligation to insure. This being so, it would seem to deprive of all force the argument of complainant last adverted to, viz: that, inasmuch as the mortgage provides that in case of default in the performance of any of the covenants of said mortgage, the same shall, at the election of the mortgagee, become due and payable, and that foreclosure proceedings having been instituted (whether distinctly for this special default, or not), there was a right in the complainant trustee to enforce, by entry and holding possession, the lien of the mortgage for such a breach of this covenant, and that such lien is thereby impressed on this insurance fund, payable by the terms of the policies to the appellant company in its own right. But, if it be true, as we have stated it to be above, that the implied contract of the appellant, as grantee of the equity of redemption, with the mortgagor and grantor, to pay the mortgage debt (if such implied contract existed), does not draw with it an obligation to perform the covenants of the mortgage, the *nexus* between such default and the funds resulting from insurance, taken out by appellant company, in its own right and for its own benefit, fails to be established.

The apparently hard situation of the complainant in this case, might incline a court to desire, but cannot clothe it with, the power to grant the relief sought.

Nor is the claim for a lien upon these funds helped by being rested upon the theory suggested by the second branch of the proposition

we have been discussing; that is, that the defendants, or one of them, came under such an obligation to indemnify the mortgagor for his liability under the alleged contract to insure as would be available to complainant in this suit. The view we have taken, as to the covenant to insure, where the grantee of the equity of redemption takes subject to the mortgage containing such covenant, would seem to apply also to this contention of the complainant, but as the complainant rests mainly upon this proposition, we must consider it more closely. Two questions present themselves under it. First, was there an obligation resting on the appellant company to indemnify the mortgagor for his liability under the alleged contract to insure, by reason of the conveyance to it of the mortgaged premises, expressly subject to the mortgage; and, second, if there was such an obligation on appellant company, can it be made available to complainant in this suit? We have already said that this alleged covenant or contract to insure was not one which ran with the land, as it lacks the essential characteristics of such a covenant. It is entirely personal in its character, and does not bind the grantee of the equity of redemption, unless it does so by force of a contract, express or implied, between the parties to the conveyance. Columbia Ins. Co. *vs.* Lawrence, 10 Peters, 507. Vernon *vs.* Smith, 5 Barn. & Ald., p. 1.

As we understand complainant in its brief and argument to practically admit that this is so, further discussion on this point is unnecessary. The reasoning that would exclude the implication of a direct obligation on the part of the defendant company to insure for the benefit of the mortgagee, by reason of its having become the grantee of the equity of redemption, subject to the mortgage, would seem also to exclude the implication of an obligation to indemnify the mortgagor on his covenant to insure. The taking expressly "subject to a mortgage for $250,000" may well be equivalent, as we have before stated, to an express contract to be responsible to the mortgagor for the mortgage debt, as part of the purchase-money, but there is no implication in such a taking, that the grantee is to be liable on the personal covenant of the mortgagor to insure. It is not within the terms of the contract, and it would be doing violence to the situation to impose such a liability, without some evidence of assent on the part of such grantee. The only way in which the grantee of the equity of redemption becomes liable to the mortgagor and vendor, even to pay the mortgage debt, is by virtue of the contract, expressed in the direct assumption of the mortgage as part of the purchase-money, and, in the absence of such an assumption, it would be creating a contract for such grantee, to hold him responsible for any covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee.

We are here dealing with contract, not with status, and no claim can be enforced against the appellant company, either directly or indirectly, by the impressment of lien on its money or property, unless such claim rests upon an actual contractual relation, or upon such conduct of appellant as amounts to fraud, and estops it from denying such claim.

The case of Miller *vs.* Aldrich, 31 Mich., 410, referred to by the learned judge below, and the only authority cited for the
231 proposition, that the covenant to insure for the benefit of the mortgagee is incidental and supplemental to the mortgage debt, and binding on the purchaser of the equity of redemption, presented facts which clearly involved fraud on the part of the purchaser. As stated by Judge Cooley, who delivered the opinion of the court, the facts were these:

The owner and mortgagor (Chapman) had made an express contract with the mortgagee (Miller) to insure for his (Miller's) benefit, and in pursuance thereof, took out a policy of insurance for the benefit of and payable to the mortgagee. Chapman afterwards sold the property, subject to the mortgage, to one Aldrich, who, with knowledge of the contract to insure, agreed to maintain the existing policy of insurance for the benefit of the mortgagee. "Instead, however, of having the insurance policy assigned to Aldrich, it was surrendered, and a new one taken out in the name of Aldrich, and without providing in terms for the protection of Miller. This insurance was for eight hundred dollars, which was quite as much as the value of the building would justify. Miller, when he was informed what had been done, called upon Aldrich and expressed apprehension about his security, but Aldrich quieted him by assuring him that in the event of loss, he should be protected by the insurance money. The building was actually destroyed by fire in the December following, and the loss has been adjusted and is ready to be paid over, but Aldrich now refuses to apply any portion of the money to the protection of Miller. The purpose of this suit is to compel the application, and the circuit court has decreed that the insurance moneys, to the amount of the Paine note, shall be paid into court to be paid over to Miller on his discharging his mortgage."

The facts here disclosed would clearly estop Aldrich, the purchaser of the equity of redemption, by reason of his fraud, from denying that the insurance money belonged to the mortgagee.

There is still another ground upon which exemption from the liability to insure for the benefit of the mortgagee could be claimed by the defendants in this case; that is, that under the fourth article of the mortgage, the mortgagor is exempted from all personal liability for the mortgage debt, and as, under the Pennsylvania law, as declared by its supreme court, the liability of a purchaser of mortgaged premises, under and subject to the mortgage, was one of indemnity to his grantor in respect to such mortgage debt, it follows that such liability could exist in the present case. As the liability to indemnify the mortgagor on his covenant to insure is incidental and subordinate to his liability for the mortgage debt, no such liability to indemnify rests upon the appellant company and grantee in this case. This view would, of course, destroy the basis for any derivative claim on the part of this complainant, with respect to such liability.

We come now to consider the complainant's last claim,
232 which is, that the special circumstances and facts of this case, as disclosed in the record, are such as would make it inequitable for the defendants to deny the relief sought, and that therefore

the court should impress a lien in its favor, upon the funds which, as it claims, are now in court and subject to the court's disposition. As we have already intimated, such facts and circumstances must amount to fraud on the part of the appellant company, and serve in the absence of any express contractual relation to estop it from denying that these funds, the products of its own insurance, should be applied for the benefit of the complainant. We have carefully read and considered the record in this respect, and fail to find a state of facts showing fraud or that would constitute an estoppel. It is true that Kann, one of the defendants, and the predecessor of the appellant company in title, became a stockholder and officer in the original company; that he found it in bad financial condition; that he loaned it money, and that finally, for his own protection, and that of others in interest, he was active in promoting the suit in the Pennsylvania State court, which resulted in the receivership and sale of the mortgaged property. We can discover nothing in the conduct of Kann, up to this point, to justify the charge of fraudulent conduct on his part, or that his conduct was otherwise than that of a practical business man intent upon honestly securing the stake he had made in the company's affairs, or that he otherwise than honestly and prudently managed its affairs, so far as he had the management of them, nor do we find that the imputation that he deliberately wrecked the company, that he might become a purchaser of its property at a nominal price, is justified by the testimony. He became the purchaser at an open sale made by order of the court, and afterwards confirmed by it, and expressly subject to the mortgage of $250,000. He held it for a year, and then conveyed it to the Penn Plate Glass Company, one of the defendants in the present suit. Whether he organized the latter company for the purpose of taking the title and carrying on the business, or not, is immaterial. If he did, he did only what he had a right to do, and the company so organized and taking the property by lawful conveyance, subject to the said $250,000 mortgage, stands before the court as a *bona fide* purchaser for value. Kann undoubtedly knew, and the appellant company also had notice, not only of the mortgage, subject to which he and it expressly took title, but of all the covenants and conditions contained in the same. Although not very material, the court below seems to have been mistaken in assuming that the policies of insurance taken out by the mortgagor, or by the receiver, were intentionally allowed to lapse by Kann, after his purchase, without the knowledge of the trustee, and that without such knowledge, he afterwards took out policies in his own name, on his own interest, and payable to himself, with the express exclusion of the bondholders from any interest in the same. The
233 court was also mistaken in finding as a fact that this "insurance was placed by a party to this litigation under the stress of an application for the appointment of a receiver, and a consequent exclusion from possession," and also in finding that pending the application for a receiver in the original foreclosure suit, the defendants signified their intention to place insurance upon the property, for the benefit of the trustee, if they were bound to do

but subsequently and without knowledge of the trustee, took out policies now in suit, payable to themselves and expressly excluding the bondholders from any interest in the same; and in also ling that, pending the appointment of a receiver, "the purchasers eed to, and did, place insurance."

The facts in this regard, as disclosed by the record, are that, immediately after his purchase of the property, at the receiver's sale, n, denying the request of the trustee and mortgagee, that he uld insure for its benefit, took out policies such as are here in stion, and the same were renewed and maintained by the appel- company. That this was done openly and with full notice to trustee and complainant in this suit, that no duty was recognized either of the defendants to insure for its benefit.

s there was nothing in the conduct of Kann, in his dealings with mortgagor company, or the complainant, up to the purchase by at the receiver's sale, to affect or qualify his rights as a *bona fide* chaser, no more can we find in the record, since that time, any- g that would amount to a fraud on this complainant, or serve to p him or the appellant company from asserting his or its right he funds arising from the policies taken out in its name, and for sole benefit, and in express repudiation of any duty or right of plainant company in regard to insurance.

he complainant also lays much stress upon its allegation, that appellant company obstructed complainant in its efforts to take session of the mortgaged property, and thereby prevented it from lying the rents and profits to insurance. But it appears that the acts of obstruction the complainant is able to specify, are the earance of the appellant company in defense of the foreclosure , that, in defending the same, it resisted in open court, during proceedings in this suit, the application for a receiver, and the y in reaching a final decree, consequent upon the defense made he appellant company and Kann, the other defendant identified it. Upon careful examination, this allegation, and the contenfounded upon it seem frivolous. The defendants were brought court by process, and exercised an unquestioned right in interng, as they did through respectable counsel learned in the law, defenses which they were advised to make. Their course in respect was not rebuked by the court, in fact, the court took their view as to the propriety of appointing a receiver, *pendente lite*, and declined to grant the application of complainant therefor. And this, even though it was suggested there was no insurance on the premises for the benefit of the tgagee, and that defendants had declined to so insure, and re- l to recognize a duty so to do.

he court, in declining to appoint a receiver, said (to again quote anguage): "I can't decide that question," *i. e.*, whether the dean company was bound to insure for the benefit of the mortee and bondholders; "but that if they were so bound they ought rotect us" (the mortgagee and bondholders). It was at this junc- that the occurrence much dwelt upon by complainant took place. n and Wertheimer (large stockholders in appellant company)

agreed to give, and did give a stipulation in writing, that out of the then existing policies, upon the interest of the appellant company, there should be set aside, in case of loss by fire, a sum sufficient to pay the valid outstanding (not including those held by said Kann and Wertheimer), provided that it should be finally adjudicated that the said appellant company was bound, as grantee of the equity of redemption, by anything contained in said mortgage, or in the terms of its said purchase, to keep or maintain insurance for the benefit of the bondholders.

The appellant company was not a party to this stipulation. Its only object and effect was to satisfy the court of the sincerity of the contention, that the owner of the premises was under no obligation to insure for the benefit of the mortgagee, and that there was no disposition to evade such obligation, if it should be judicially determined that it existed. This is very far from justifying the contention of complainant, that the giving and filing this written agreement in some way served to put the court in control of the funds that might arise from this insurance, in such fashion as to clothe it with a special jurisdiction to administer and apply the same. No duty of administering and disposing of a *res* in court was imposed by this stipulation, and no special equitable jurisdiction was raised thereby.

We are of opinion, therefore, that there is no direct liability between the appellant company and the mortgagee, because of the special circumstances disclosed in the record, and, admitting for the sake of argument, a liability of the defendant, as purchaser, to indemnify the mortgagor for its liability on the mortgage debt, and for its alleged obligation to insure, we find no special circumstances that would serve to transfer that liability into a liability to the complainant, in the shape of a lien impressed for its benefit upon the insurance funds. This view would dispose of the case, without considering the special theory and contention of the complainant, that having all the parties before the court, and the *res* (being the funds paid by the insurance companies) in court, the court, by recognizing a liability on the part of the defendant company to indemnify the mortgagor on his covenant to insure, instead of first compelling a proceeding against the mortgagor on said covenant, can, in order to avoid circuity of action, impress the funds in its hands, with a lien in favor of the complainant. But this theory assumes the liability to indemnify on the covenant to have been established, and that by reason of some special circumstances in the case, an equity has arisen in complainant to have that fund appropriated to its use. There is another criticism to be made upon this theory, in regard to the allegation that the *res* in the hands of the court gives a special remedial jurisdiction in the case. These funds which constitute the *res*, are not in the hands of the court in any such sense as that a special jurisdiction to administer them attaches. They have only come into possession of the court through its receiver, by reason of the claim, that complainant has an equitable lien upon them, and there is a manifest impropriety under such circumstances in contending for a special jurisdiction for such relief

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on that account. What has been said, renders it unnecessary to consider the effect of the act of assembly of the State of Pennsylvania, of 1878. That act provides that grantees of real estate, subject to mortgage, shall not be personally liable for payment of such mortgage, unless they shall, by an agreement in writing, have expressly assumed a personal liability therefor, and providing that the use of the words "under and subject to the payment of such mortgage" shall not alone be construed to make such grantee personally liable, as aforesaid. We will observe, however, that whatever may be the effect of this act upon the liability of grantee to grantor, of real estate so encumbered, there can be no question that it was intended to destroy all derivative liability of grantee to mortgagee, unless such liability has been created by an express undertaking in writing. As we have before said, much of the difficulty in this case arises from the apparently hard situation in which the mortgagee and bondholders find themselves, and the not unnatural disposition to confound hard conditions with inequitable ones. In this respect, however, it should be remembered that both the owner of the equity of redemption and the mortgagee had separate insurable interests, and that the mortgagee was fully notified of the absence of insurance for his benefit, and of the refusal on the part of either of the defendants as owners of the premises to insure for its benefit, or to recognize a duty to do so. It could have insured the bondholders' interest after the foreclosure suit began, and charged the expenses of so doing to them. (Stinson *vs.* Ins. Co., 103 U. S., 25; 1 Jones on Mortgages, sec. 397.) Instead of doing so, it chose to rely upon its peculiar view of the obligation of the defendants, and took the risk of justifying that view of the law, should it become necessary to do so.

For the reasons given, we are of opinion that so much of the decree of the circuit court as relates to the disposition of the insurance moneys collected by the receiver under order of the court, must be reversed, and the court below directed to enter a decree that
236 said moneys shall be paid to the said defendant, The Penn Plate Glass Company. And that the said defendant have its costs under the said supplemental bill. It is so ordered.

Filed June 14, 1900.

In the United States Circuit Court of Appeals for the Third District.

THE PENN PLATE GLASS COMPANY, Appellant,
*vs.*
THE FARMERS' LOAN AND TRUST COMPANY, Appellee.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

*Dissenting Opinion.*

ACHESON, *Circuit Judge* (dissenting):

I am not able to concur in the views expressed by the majority of the court and I dissent from the decree of reversal. As a justification for this dissent I might well content myself with a reference to the exhaustive opinion of the court below. The importance of the case, however, both as respects the amount in controversy and the principles involved, seems to call for a specific statement of the reasons which influence me.

I differ from the majority of the court upon the fundamental question whether under the terms of the trust, deed or mortgage there was an obligation upon the Pennsylvania Plate Glass Company, the mortgagor, upon demand by the trustee, to insure for the benefit of the bondholders. I have no difficulty in finding such an obligation in the stipulation in relation to insurance contained in the tenth article of that instrument. "It shall be no part of the duty of the party of the second part to file or record this indenture; * * * nor shall it be any part of its duty to effect insurance against fire or other damage or any portion of the mortgaged property, or to renew any policies of insurance; * * * but the trustee may, in its discretion, do any or all of the matters or things in this paragraph set forth, or require the same to be done." It is very clear to me that by this clause a right was conferred upon the trustee in the interest and for the protection of the bondholders to require
237 insurance against fire to be placed by the mortgagor upon the mortgaged property. The parties to this indenture were the mortgagor as party of the first part and the trustee as party of the second part. Now a contractual right in one of two parties to an instrument to require a thing to be done implies a contractual obligation upon the other party to do the required thing. Here the right given to the trustee to require insurance involved a correlative duty on the part of the mortgagor to effect such insurance. As the judge below well said unless the mortgagor "imposed the fulfilling of such requisition upon itself it imposed it upon no one." Indeed unless read as the court below read it, the clause relating to insurance is absolutely meaningless.

Cogent reasons for imposing upon the mortgagor the obligation of effecting insurance for the security of the bondholders lie on the very surface of the case. As the preamble to the mortgage recites,

the bonds were issued "to be used toward the payment of liabilities incurred in the erection of a plate-glass works" in course of erection upon the mortgaged premises, and the evidence shows that they were so used. It was the proceeds of these bonds that erected the works. Now, throughout this litigation it has been strenuously asserted by the Penn Plate Glass Company, the appellant, that by virtue of article fourth of the mortgage the mortgagor was exempted from liability of a personal nature to pay either the principal or interest of the bonds and that the remedy of the bondholders for payment was confined exclusively to the mortgaged premises. I understand the majority of the court to accede to this view. Manifestly, then, insurance was of the greatest importance to the bondholders. Indeed, it was a vital matter to them. Without insurance, they had no adequate security. For, it appears from the testimony of W. L. Kann that the land upon which the works were erected was worth "probably $5,000 or $6,000" only. (Record, vol. 1, p. 485.)

The locality was rural and the land consisting of twenty-one acres, according to his estimate, was worth only about $300 an acre. This bonded mortgage debt, it will be remembered, was $250,000.

It is a very significant fact that from the time the works were built down until Kann's purchase, in June, 1894, no one had questioned the right of the bondholders under the terms of the mortgage to protection by insurance taken out by the mortgagor for their benefit. (Testimony of Joseph W. Stoner, *passim*, Record, vol. II.) Upon demand by the trustee the mortgagor company effected and always maintained insurance for the benefit of the bondholders usually to the full amount of the mortgage debt and at no time less than $200,000, down to the appointment of the receiver by the State court, in March, 1894; and upon the like demand of the trustee the receiver, acting under the order of the State court, maintained such
238 insurance for the benefit of the bondholders to the full amount of the mortgage debt, receiver's certificates having been issued under the order of the court for the purpose of effecting the insurance. That insurance was in full force when Kann purchased, it having then some months to run. This practical construction by the parties to the instrument of the provision touching insurance may not be conclusive here, but surely it should have great weight in fixing its meaning if the language employed be deemed of doubtful import. I myself do not regard the language as at all uncertain. It seems to be unmistakably to impose upon the mortgagor company the obligation to insure for the security of the bondholders upon demand by the trustee.

Assuming the existence of a covenant or stipulation in the trust mortgage binding the mortgagor company to insure for the benefit of the bondholders, I pass to the question whether the appellant company came under the operation of this provision of the mortgage.

Before adverting to the terms of the deed from the receiver to Kann and the deed from the latter to the appellant, some collateral matters deserve notice. Kann was a stockholder in and a director of the original plate glass company, the mortgagor, and treasurer

thereof. At the time of his purchase he had knowledge of the terms of the trust mortgage and actual notice of the then existing insurance which the receiver, acting under the order of court, had effected for the benefit of the bondholders. Kann organized the new plate glass company, the appellant, to operate the works on the mortgaged premises, conveyed the property to it, and became its president. The mortgage trustee at once duly notified first Kann and then his new company, upon its organization, to insure for the security of the bondholders. The trustee likewise duly notified the mortgagor company to insure. That the old company was insolvent and in the hands of a receiver and that the mortgage trustee was without funds were facts known to Kann and his company, the appellant.

The deed to Kann, in accordance with the terms of the order of court under which it was made, distinctly set forth that the conveyance was made "subjected" to the trust mortgage, and the deed from Kann to the appellant likewise set forth that the conveyance was made "subject" to the mortgage.

The first article of the trust deed or mortgage provided thus: "Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds thereby secured, or some of them, or in the performance of some one or more of the covenants, stipulations or agreements herein required by it to be kept, performed or done, the said party of the first part shall be suffered and permitted to possess, manage, operate and enjoy the said hereinbefore mentioned and described plate-glass works and premises, with the appurtenances, and to make and use the incomes, rents, issues and profits thereof and to dispose of the same in any manner not inconsistent with these presents."

239 And the second article makes provision for entry by the trustee and eviction of the mortgagor company upon default by it continued for six months after demand by the trustee, "in the performance of any covenant, agreement or stipulation" contained in the mortgage and thereby "required to be kept and performed" by the mortgagor.

Certainly the deed from the receiver conveyed to Kann no other or higher rights than those which were vested in the mortgagor company itself. Kann and his grantee, the new company, stood in the shoes of the mortgagor company in respect to title and right of possession. The above-quoted part of the first article of the trust mortgage, equally with the second article, bound the appellant company. Its possession of the property and perception of the income, rents, issues and profits depended upon performance of the stipulation to insure for the benefit of the bondholders. It could not rightfully remain in the possession and enjoyment of the property without thus insuring after the demand so to do made by the trustees. Therefore having taken out insurance while thus in possession and in the exclusive receipt of the income, rents, issues and profits of the property, equity will conclusively presume that the insurance was taken out and held for the benefit of the bondholders. To effectuate justice equity here will consider that as done which should have been done. Under the circumstances the appellant company is not

to be heard to say that the insurance was not for the security of the bondholders.

In my judgment the case of these bondholders—their claims to an equitable lien upon the insurance fund which stands for the destroyed property—does not at all depend upon the existence of a personal liability on the part of the mortgagor company to pay the mortgage debt. Nor does their case necessarily rest upon the theory of the assumption of that debt by the appellant company. The covenant or stipulation for insurance contained in the trust mortgage lies at the foundation of the equitable lien here asserted. If it be true that there is no personal liability for the debt on the part either of the mortgagor company or its successor in the title, the appellant company, if the mortgaged property itself was the only security the bondholders had, their equitable right to the substituted insurance fund is only the clearer.

Now the conveyance of the property to the appellant company, as we have seen, was made expressly subject to the trust mortgage and the appellant company accepted the conveyance thus made and under it took and maintained possession of the property. Then the trustee in due time and form required insurance to be effected for the benefit of the bondholders. The appellant company, with full knowledge of the facts, had voluntarily taken the place of the insolvent mortgagor company. Under the special circumstances, the appel-
240 lant company should be regarded, I think, as having assumed the obligation to insure as stipulated in the mortgage.

But if a direct contractual liability to insure is not thus to be implied as against the appellant company in favor of the trustee still, I am of opinion that the court below rightfully held that the appellant company under the conveyance to it of the property subject to the mortgage, became bound to indemnify the mortgagor company against its liability upon the covenant or stipulation for insurance contained in the trust mortgage. Moore's Appeal, 88 Pa., 480; Blood *vs.* Crew Levick Co., 171 Pa., 328, 338. The Pennsylvania act of June 12, 1878 (Pampl. L., 205), as these two cited cases show, has no application here. That act has no relation whatever to a covenant to insure. The only purpose of the act was to relieve a vendee from an implied personal liability to pay the mortgage debt arising from the "under and subject" clause. In Blood *vs.* Crew Levick Co., however, the supreme court of Pennsylvania distinctly held that the act of 1878 does not touch the covenant of a vendee to indemnify his vendor implied from the "under and subject" clause.

The obligation resting upon the appellant company to indemnify the mortgagor company against its covenant to insure is quite sufficient of itself to sustain the equitable jurisdiction exercised by the court below and its decree in favor of the trustee. It is well settled that in a court of equity a mortgagee may avail himself of a contractual right of the mortgagor against the purchaser of the mortgaged property. Keller *vs.* Ashford, 133 U. S., 610. Here, the trust mortgage was the foundation of the suit. Pending the suit the mortgaged property in great part was destroyed by fire. Then the supplemental bill was filed. Thus circuity of action was prevented.

The fund arising from the insurance is in the hands of the court. It stands in the place of the consumed property. The trustee's claim grows out of the trust mortgage and is of an equitable nature. All the parties in interest were before the court. The equitable jurisdiction of the court with respect to the insurance fund, I think, is clear, without taking into consideration at all the so-called "insurance bond" filed in the cause.

The original bill was filed on July 8, 1896, after six months' default both in respect to interest and the stipulation to insure. The Penn Plate Glass Company (the appellant) interposed defenses which eventually proved to be entirely groundless. The trustee immediately upon the filing of the bill moved the court for the appointment of a receiver to take charge of the mortgaged property. This motion the Penn Plate Glass Company resisted. In order to secure the denial of the motion it procured and had filed in the cause a stipulation under seal signed by W. L. Kann, the president of the company, and Emanuel Wertheimer, a large stockholder, covenanting that in
the event of a loss by fire of the mortgaged property there
241 should be paid to the mortgage trustee, in trust for the holders
of valid bonds, a sum equal to the amount of such bonds "out of policies of insurance existing in favor of the Penn Plate Glass Company; provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage." This stipulation was filed in court on July 24, 1896. (Record, vol. II, page 53.) The order denying the motion for the appointment of a receiver was not filed until September 7, 1896. (Record, vol. I, page 2.)

It is true it appears from the testimony that the judge had previously signified to counsel his intention to deny the motion; but, thereupon, in open court—Kann, the president of the Penn Plate Glass Company, and the counsel of the company being present—the counsel for the trustee called the attention of the court to the matter of insurance. The following is the testimony of the counsel as to what occurred: "I said to the court that in considering the motion for a receiver, it occurred to me that the court had not considered the fact that this property was without insurance, that there was danger of fire, that my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage, and under the circumstances, Judge Buffington said: 'I can't decide that question,' and intimated to them that if they were bound to insure they ought to protect us, and they denied they were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimer was given to us in pursuance of my demand for insurance, and filed in court, and is on file today."

This testimony is unimpeached. Certain it is that the court for-

bore final action upon the motion for a receiver until after the giving of this stipulation as to insurance.

Now it is true that the Penn Plate Glass Company did not formally join in the execution of this paper, but it procured and had it filed in court. This is averred in the supplemental bill and is not denied in the answer. Beyond contestation this stipulation was given at the instance and in behalf of the Penn Plate Glass Company and for the purpose of preventing the appointment of a receiver, and it had that effect. In consequence of giving this stipulation that company was enabled to retain possession of the mortgaged premises against the trustee—without right as the subsequently taken proofs demonstrated. The fire of April 12, 1898, oc-
242 curred while the trustee was thus wrongfully kept out of possession by the appellant company.

In the course of his opinion the judge below said:

"This insurance was placed by a party to this litigation under stress of an application for the appointment of a receiver and a consequent exclusion from possession." It is said that the judge fell into mistake as to the time the insurance was placed. I am not convinced of this. The policies were before him. We have been furnished with their dates. It is, however, certain that the observation of the judge just quoted is applicable in all its force to the so-called "insurance bond." That stipulation in respect to the insurance was given "under stress of an application for the appointment of a receiver" and to prevent the appellant company's expulsion from possession. But the time when the policies were taken out, whether before or after the application for the appointment of a receiver, is not a controlling matter. If, indeed, they were taken out before that application, this makes it rather the worse for the appellant company. For then it follows that the fact was suppressed that each policy contained this clause, namely: "This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders." The presence of that clause was not known to the court or to the mortgage trustee until after the loss by the fire. In respect to the insertion of this clause the judge below in his opinion speaks thus: "It was an act *inter alios acta;* the trustee and the court had no knowledge of it; it was not done in pursuance of any agreement and can in no way affect the legal and equitable status and rights of the parties before the court." This, I think, is a sound conclusion.

The insurance companies did not see fit to raise any question as to the measure of their liability. They have settled in full. The insurance as taken was not in form or in effect upon the equity of redemption. It was not upon the interest of the Penn Plate Glass Company in the property as intimated in the opinion of the majority of this court. The insurance was upon the glass works, namely, the buildings, machinery, apparatus and other fixed improvements. The corpus of the property was the subject-matter of the insurance. The insurance companies have paid to the court's receiver the total value of the destroyed property. The appellant company claims

not the value of its equity in the lost property but the entire insurance fund, the total value of the destroyed property. The court below decided against the claim as inequitable. I hold to the same view.

How unconscionable the position of the appellant company is becomes the more manifest when regard is had to the value of the improvements which Kann and his vendee company (the appellant) put on the mortgaged property. The highest figure for all
243 their expenditures as given by Kann himself are "about" $185,000 to $200,000. Now if the larger of these amounts is correct, the reversing decree here will result in a great money speculation for the appellant company at the expense of the innocent bondholders. But in fact Kann's testimony when scrutinized discloses that the bulk of the alleged expenditures was in the purchase of additional ground (outside the mortgaged premises) and in the erection thereon of a water plant and a gas plant (Record, vol. I, pages 475 and 476). It will be remembered that the price Kann paid to the receiver for the property was $37,500, only, and the alleged price paid by the appellant company to Kann for the property was only $83,500.

In concluding I cannot do better than refer to the case of Miller *vs.* Aldrich, 31 Mich., 408, 410, 419, cited by the court below. I premise that there the agreement by Chapman the mortgagor to insure for the benefit of the mortgagee was not even contained in the mortgage but was collateral and oral, and whether Aldrich, the purchaser, had verbally promised as alleged to keep up insurance for the benefit of Miller the mortgagee was denied. Judge Cooley in the course of his opinion said: "Though Chapman may have had a legal right to surrender the policy he had taken out for Miller's protection he had no equitable right to do so; and as Aldrich knew all the facts, and took his new policy on a wrongful surrender of one which protected Miller, and for a sum which precluded Miller from insuring on his own behalf, we think Miller must be held to have an equitable interest in the new policy to the extent of his lien, whether Aldrich did or did not expressly agree with Chapman that such should be the case, as the latter says he did. The case is within the principle of Cromwell *vs.* Brooklyn Ins. Co., 44 N. Y., 42, and it is not important whether Chapman had or had not legally bound himself to Miller to keep up insurance for his benefit, when by virtue of the oral understanding he had actually effected such insurance."

Chief Justice Graves, who delivered the principal opinion, said; "Chapman had bound himself to afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgaged buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn."

"This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and on all others in his shoes with notice."

"When he sold to Aldrich he does not appear to have kept any insurable interest, or to have been in a situation to personally effect insurance to any amount, and Aldrich appears to have taken his place, and to have occupied a situation which required him
244 to recognize and respect the term of the agreement intended to fortify Miller's security under the mortgage. Instead, however, of recognizing and respecting it, he joined in the transaction to set it aside, and to so place himself that if the mortgaged property should burn he might put the mortgage money, of which he had already received the benefit, in his own pocket, and leave Miller a remediless loser to that amount."

"As before intimated, I think equity will not sanction this; but will consider that the agreement between Chapman and Miller, in regard to insurance, was enforceable by the latter against the former, and that Aldrich's position exposes him to a similar remedy in favor of Miller."

The facts here, I think, make a far stronger case in favor of the mortgagee than did the facts in Miller *vs.* Aldrich. The principle there laid down commend themselves to my judgment. If applied here, as I think they should be, they would lend to an affirmance of the decree of the court below.

United States Circuit Court of Appeals for the Third Circuit, September Term, 1899.

THE PENN PLATE GLASS COMPANY, Appellant,
*vs.*
THE FARMERS' LOAN AND TRUST COMPANY. } No. 19.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the western district of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter a decree that said moneys shall be paid to the said defendant—The Penn Plate Glass Company, with costs under the said supplemental bill.

GEO. M. DALLAS,
*Circuit Judge.*

Philadelphia, June 19, 1900.

245 United States Circuit Court of Appeals for the Third Circuit

PENN PLATE GLASS COMPANY, Appellant,
*vs.*
FARMERS' LOAN AND TRUST COMPANY, Trustee.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

And now, to wit: this thirty-first day of July, A. D. 1900, it is ordered that mandate issue to the said circuit court of the United States for the western district of Pennsylvania in accordance with the opinion and decree of this court in said cause.

GEO. M. DALLAS,
*Circuit Judge.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

[SEAL.]

Whereas, lately in the circuit court of the United States for the western district of Pennsylvania, before you, or some of you, in a cause between The Pennsylvania Plate Glass Company, a corporation duly created and existing under the laws of the State of Pennsylvania, and a citizen of said State, The Penn Plate Glass Company, a corporation duly created and existing under the laws of the State of Pennsylvania, and a citizen of said State, and William L. Kann, a citizen of the State of Pennsylvania, appellants, and, The Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, appellee, wherein the decree of the said circuit court entered in said cause is in the following words, viz:

"This case came on to be heard at this term upon the original and supplemental pleadings, and upon the proofs and was argued by counsel, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed, that the mortgage
246 set forth in the original bill of complaint herein made by the defendant The Pennsylvania Plate Glass Company, to the complainant, The Farmers' Loan and Trust Company bearing date the first day of January, 1891, is a valid and subsisting mortgage and constitutes a first lien, except as such lien has been released as herein stated, upon the mortgaged premises and property, which said premises and property are described in the said mortgage as follows (the words 'party of the first part' in the said description referring to the said Pennsylvania Plate Glass Company):

All that certain tract of land, with the buildings and improvements thereon, situated in North Huntington township, county of Westmoreland and State of Pennsylvania, bounded and described as follows, beginning at a post on the northwest corner of Fourth street and Broadway avenue in the town of Irwin; thence by the line of

said Fourth street north 1 degree 18 minutes east, nine hundred and fifteen (915) feet to a post: thence by land of C. W. Pool north 88 degrees 42 minutes west, five hundred and eighty-six (586) feet to a post; thence by same north 65 degrees 50 minutes west four hundred and two feet six inches (402 ft. 6 in.) to a post; thence by same south 2 degrees 67 minutes east, four hundred and seventy-six (476) feet to a public road and line of Swigger's heirs; thence by the same south 65 degrees 50 minutes east, one hundred and fifteen (115) feet to a post; thence by same south 23 degrees 10 minutes west, five hundred and twenty-seven (527) feet to a post on the line of Broadway avenue; thence by said avenue south 49 degrees 42 minutes east, one hundred and three feet to a post; thence by said avenue south 88 degrees 42 minutes east, nine hundred and thirty-one (931) feet to a post at Fourth street, the place of beginning, containing twenty-one (21) acres more or less.

Being part of a tract of land called 'Fruit Hill,' for which a patent was issued by the Commonwealth of Pennsylvania to William Elliott, dated 2nd May, 1788, and part of which land so patented became vested in C. W. Pool by deed from J. L. Ewing *et ux.*, by deed recorded in Westmoreland county aforesaid, in Deed Book 177, page 135, and being the same tract of land which the said C. W. Pool conveyed to Philip Semmer by deed dated the 16th day of June, A. D. 1890, and recorded in said county in Deed Book 184, page 410, and thereafter conveyed by said Philip Semmer to the party of the first part hereto by deed dated the 28th day of August, 1890, and recorded in said county in Deed Book 184, page 408. And also all the right, title and interest of said party of the first part of, in and to and arising from a certain assignment made by A. C. Boyd and Philip Semmer, as partners, composing the firm of A. C. Boyd and Company to it, the said party of the first part, bearing date August 30, A. D. 1890, wherein and whereby, for and in consideration of one dollar, said A. C. Boyd and Company sold assigned,
247 transferred and set over unto said party of the first part hereto, all their right, title and interest of, in and to certain contracts whereby the Irwin Natural Gas Company for certain valuable considerations, contracted and obligated themselves to furnish natural gas in sufficient quantities for the successful operation of a plate-glass plant, having a capacity of three twenty-pot furnaces with the necessary annealing ovens and appliances and all other uses necessary for the proper operation of said plant for and during the term of ten years from the 16th day of June, A. D. 1890, subject to the rules and regulations of said Irwin Natural Gas Company, the said plate-glass plant above referred to being situate on the above-described premises of the party of the first part.

And also all of the right, title and interest of the party of the first part of, in and to and arising from a certain contract now held and owned by it through mesne assignments made between C. W. Pool and Philip Semmer, bearing date the 16th day of June, A. D. 1890, wherein and whereby said C. W. Pool agreed for the sum of one dollar per annum to deliver at the property line of the premises, as above set forth, a sufficient quantity of water to supply all the needs

of the plate-glass plant to be erected thereon, for a period of three years from the 16th day of June, A. D. 1890, subject to the rules and regulations of the Irwin Water Company, said plant referred to now being erected by the party of the first part.

And also and singular, all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises.

Together with all and singular the tenements, hereditaments and appurtenances belonging to the said above-described premises, or thereunto in anywise appertaining, and the reversions, remainder, income, rents, issues and profits thereof, and also all the estate, right, title, interest, property, claim and demand whatsoever, as well in *land* as in equity, of the said party of the first part of, in and to the said premises, and every part thereof with the appurtenances.

Since the making of said mortgage, and on or about the — day of ——, 1892, a small strip of said premises consisting of $\frac{236}{1000}$ acres was, in consideration of the receipt of $300 by the complainant herein, duly released from the lien of said mortgage by release executed by the said complainants on the — day of ——, 1892, and recorded in the office of the recorder of Westmoreland county, in the State of Pennsylvania, in — Book, page —, and the said strip of land so released is no longer subject to the lien of said mortgage. The complainant holds said consideration of $300 as trustee for and to the use of the bonds and coupons secured by said mortgage as part of the security of said mortgage.

248 And it appearing to the court that since the filing of the opinion of the court herein, the Pennsylvania Railroad Company, claiming to exercise the right of eminent domain under the laws of the State of Pennsylvania, for the purpose of widening, straightening and improving its tracks, has entered into possession of a certain portion of the said mortgaged property and premises, and has given bond in the court of common pleas of Westmoreland county, Pennsylvania, to pay all damages resulting from the said taking and condemnation.

It was further ordered, adjudged and decreed that the complainant, as such mortgagee, has a first lien upon any and all damages arising from the condemnation of the mortgaged premises which may be collected under said bond because of said taking and condemnation, to the extent hereinafter specified.

It was further ordered, adjudged and decreed, that the lien of the said mortgage is prior and superior to any other lien or claim of any kind or description in favor of any party to this cause; that default has been made in the payment of interest due on the bonds secured by said mortgage entitling the complainant to a sale of the said mortgaged property hereinabove described, unless the defendants or some of them pay the amount of the entire bonded indebtedness secured by said mortgage, with all the costs and expenses of this suit at a short day to be fixed by the court. That there are secured by said mortgage lien a large number of bonds and

coupons, with interest thereon, of the said defendant, The Pennsylvania Plate Glass Company, which are outstanding and past due, such coupons so outstanding and unpaid being coupons which matured and fell due on the first day of July, 1895, and every six months after that date.

And it appearing to the court that the defendant, The Pennsylvania Plate Glass Company, executed two hundred and fifty bonds of one thousand dollars each, being bonds to secure which the mortgage under foreclosure herein was executed and delivered, and that said Pennsylvania Plate Glass Company, having executed said bonds, presented them to the complainants, as trustee, for certification, and that said complainant thereupon, certified the same and delivered them upon the order of the said Pennsylvania Plate Glass Company.

It was further ordered, adjudged and decreed that it be referred to William R. Blair, Esq., as special master, to ascertain and report, which of said bonds, so certified as aforesaid, are entitled to the security of said mortgage, the principal sums due and unpaid on said bonds, and the entire aggregate amount of such principal sums; that said special master may hold sessions in the cities of New York, in the State of New York or Pittsburg, in the State of Pennsylvania, and at such other places within the United States as he may deem proper, giving five days' notice by mail or otherwise of such sessions to the complainant, the defendants The Penn
249 Plate Glass Company and W. L. Kann and to Emanuel Wertheimer, James G. Beamer and all other bondholders whose names and addresses are known to the complainant, and that said special master report to this court within ninety days from the date of this decree. And it is hereby ordered and decreed that any party or person so to be notified and appearing before said special master may read in evidence any part of the testimony heretofore taken in this cause with like effect as if such testimony had been taken before said special master.

And it was further adjudged and decreed, that upon all said bonds which said special master shall report to be entitled to the security of said mortgage, the complainant is entitled to recover not only the amount of the principal of said bonds and the coupons thereon, but also interest upon the said coupons from maturity thereof until the date of this decree, and interest on the said principal from the date of maturity of the last coupon, to wit: the first day of July, 1899, to the date of this decree. And it was further adjudged and decreed that the aggregate amount of all the said two hundred and fifty bonds, valid or otherwise, together with the coupons thereon, and the interest on the said bonds and coupons up to the date of this decree is the sum of three hundred twenty-five thousand eight hundred fifty dollars.

And it appearing to the court that a very large part of the said mortgaged property has been destroyed by fire, but that the remaining property can best be sold as an entirety.

It was further ordered, adjudged, and decreed, that the mortgaged property is so situated that it cannot be sold except as an entirety,

due regard being had to the best interests of those interested in the same; and further, that the said defendant, The Pennsylvania Plate Glass Company, is utterly insolvent and unable to pay its debts and liabilities.

It was further ordered, adjudged and decreed, that unless the parties defendant, or some of them, shall, on or before the expiration of twenty days from the entry of this decree, pay to the complainant, the following sums, namely: First, a sufficient sum of money to pay the costs of the complainant in this cause as they shall be taxed and its compensation as trustee with its counsel fees and other expenses, and other disbursements as the same may be fixed by this court; and secondly, the entire sum due for principal and interest, and interest on unpaid coupons up to the date of this decree, with interest thereon from the date hereof, then all the said mortgaged premises and property remaining after said fire, shall be sold as hereinafter directed, subject only to such easement or right therein as the said Pennsylvania Railroad Company may have acquired, or may hereafter acquire by virtue of the aforesaid taking and condemnation proceedings; provided, however, and it is
250 hereby expressly adjudged and decreed, that nothing herein contained shall be so construed as to entitle any purchaser of the mortgaged premises at such sale to collect or receive all or any part of the damages arising from the taking and condemnation of the mortgaged premises accruing by reason of such taking and condemnation; but all such damages the complainant herein is hereby expressly authorized, empowered and directed to reserve to itself for the use and benefit of the said mortgage and the bonds thereby secured, as hereinafter directed; and all the right and equity of redemption of the defendants, and each and all of them of, in and to the said mortgaged premises, property and assets, and every part and parcel thereof, shall be forever barred and foreclosed.

It was further ordered, adjudged and decreed, that if default be made in making either of said payments within said twenty days, then all the said mortgaged premises and property, real, personal and mixed, wherever situated, so remaining after said fire shall be sold as aforesaid as an entirety, and without an appraisement or right of redemption, at public auction to the highest bidder therefor, at twelve o'clock noon, upon the mortgaged premises in the town of North Irwin, Westmoreland county, in the State of Pennsylvania, on a day to be named by the special master herein appointed to make such sale, in his notice of sale; that before making such sale, the said special master shall publish a notice thereof, once a week for at least four successive weeks prior to each sale, in one daily newspaper printed, regularly issued and having a general circulation in Greensburg, in Westmoreland county, in the State of Pennsylvania, and in one daily newspaper printed, regularly issued and having a general circulation in the city of Pittsburg, in Allegheny county, in the State of Pennsylvania. And further, that the said special master, making such sale, may, either personally or by some person to be designated by him to act in his name and by his authority, adjourn the sale from time to time without further advertisement, but

only on the request of the complainant or its solicitor or by order of the court or a judge thereof.

It was further ordered, adjudged and decreed, that the said special master shall accept no bid for said property less than thirty-five thousand dollars ($35,000.00); that in case such amount above required shall not be bid therefor, the special master shall adjourn the sale and shall apply to the court for further instructions; that the purchaser, when the property is struck down to him, shall at once pay the special master ten per cent. of the amount of his bid, on account of his purchase, but in no case shall such deposit be less than the sum of five thousand — ($5,000.00) in United States currency, or in such certified draft, certificate or cheque as may be satisfactory to the said special master; that should he fail to make such payment at once, the mortgaged property and premises so directed to be sold shall be resold, the court reserving the right
251 to consider such resale as made on account of said proposed purchaser, or as an original sale, but such sale, under such circumstances, shall be made at once and without further advertisement; and that the deposit received from the successful bidder shall be applied on account of the purchase price, and that such further portions of the purchase price shall be paid in cash as the court may from time to time direct, the court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its or their successors or assigns, to comply within twenty days with any order of the court in that regard; and that the balance of the purchase price may be paid either in money or in bonds, or overdue coupons secured by said mortgage of said defendant, The Pennsylvania Plate Glass Company, to the complainant, each said bond and coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered, and according to the priority herein adjudged.

It was further ordered, that William R. Blair, Esq., be, and he hereby is designated and appointed a special master, to make the sale hereby ordered and decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof, on the order of the court or of a judge thereof, confirming such sale; the court, however, reserving the right, in term, or at chambers, to appoint another person such special master, with like powers, in case of the death or disability to act of the special master hereby designated, or in case of his resignation or failure to act, or removal by the court.

It was further ordered and decreed, that within thirty days from the confirmation of said sale or sales, or such further time as the court may allow, on application of the purchaser, for good cause shown, the purchaser or purchasers of said property shall complete payment of the entire amount, bid to the special master; and that on such payment, the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the said special master, (and from the other parties to this cause as herein provided), and to

receive *of* the property so purchased from the parties holding possession of the same.

It was further ordered and decreed, that the fund to arise from the said sale, together with the said three hundred dollars received by the complainant, at the time of the release hereinbefore described, shall be applied as follows:

(1.) To the payment of all proper expenses attendant upon said sale including the expense, outlays and compensation of the special master to make said sale, as such expense, outlays and compensations may be hereafter fixed and allowed.

(2.) To the payment of the costs of this suit under the
252 original bill herein, including the expenses incurred in taking care of the mortgaged property under the interlocutory orders herein, and a compensation to the care-taker heretofore appointed by the court herein, for his services, as said expenses and compensation may be hereafter fixed and allowed by this court.

(3.) To the payment of the compensation of the complainant herein for its services, charges and expenses in the execution of its trust under said mortgage so made to it as aforesaid, including its own compensation and commissions and its disbursements for solicitors' and counsel fees in the execution of said trust, as such charges, expenses and compensation may be hereafter fixed and allowed by this court.

(4.) To the payment of the bonds and coupons of the defendant, The Pennsylvania Plate Glass Company, secured by the mortgage foreclosed hereby, with interest thereon, or if the fund be not sufficient to pay the same, then to the payment of the same *pro rata;* that each of the said bonds presented to the special master shall, if the holder thereof shall so request be stamped or endorsed in some way by said special master, so as to show the amount that has been paid on account of the same, and on account of the coupon interest due thereon, and be returned so stamped or endorsed to the holder thereof; that in case of payment in full of said bonds and coupons with interest thereon, the same shall be delivered with payment in full stamped thereon by the special master to the purchaser or purchasers at the sale, to be held by said purchaser as a muniment of title; and

(5.) If, after making all the above payments, there shall be any surplus, the same shall be paid according to the further order of court in that regard.

It was further ordered, adjudged and decreed, that the defendant, W. L. Kann, and The Penn Plate Glass Company, and the plaintiff, The Farmers' Loan and Trust Company, be and they are hereby authorized and directed to execute and deliver, under the direction of the special master making such sale, conveyances executed by them respectively by way of confirmation and further assurance of title to the said purchaser or purchasers, his, its or their assigns, of all and singular the mortgaged property and premises, and every part and parcel thereof of every kind and description, and wherever situated, hereby directed to be sold by the said special master, and that the form of said conveyance and mode of execution thereof

shall be settled and approved by the court or a judge thereof, if any question should arise as to the form and sufficiency thereof; and that such conveyances shall be delivered to said purchasers or purchaser, his, its, or their assigns contemporaneously with the deed or deeds of the said special master.

And it appearing to the court that the defendant, The Penn
253 Plate Glass Company, has procured a very large amount of insurance upon said mortgaged premises and property, and that a very large amount of such insurance has been collected by reason of said destruction by fire of a part of said mortgaged premises and property, and that the complainant, as trustee under said mortgage hereby foreclosed, was entitled to an equitable first lien upon the said insurance and insurance moneys to the extent of all valid outstanding bonds secured by said mortgage; and it further appearing to the court that under an interlocutory order entered herein, Emanuel Wertheimer was appointed receiver herein of said insurance moneys, and that a very large part of said insurance moneys was collected by said Wertheimer as such receiver, and that under the terms of said interlocutory order said Wertheimer was directed to hold as such receiver one hundred and twenty-five thousand dollars of the insurance money so collected, and if it should be finally decreed, that the complainant herein had an equitable lien upon said insurance moneys, then to pay over to the complainant so much of said sum as should be necessary to pay and discharge the ninety thousand dollars of said bonds, other than the one hundred and fifty thousand dollars of said bonds belonging to said Wertheimer and deposited with the Farmers' Deposit national bank, as to which last-named bonds said Wertheimer had released and waived all claim to an equitable lien upon said sum of one hundred and twenty-five thousand dollars, so collected and held by him, and also to pay and discharge the coupons upon the said ninety thousand dollars of said bonds, and the costs, charges and expenses of this suit.

It was further ordered, adjudged and decreed, that the complainant as trustee under said mortgage has, and is entitled to, such equitable first lien upon said insurance moneys.

And it was further ordered, adjudged and decreed, that the said Wertheimer as such receiver, shall pay, without further order, out of the said one hundred and twenty-five thousand dollars of insurance moneys, all costs, charges and expenses of this suit under the supplemental bill herein; and if the proceeds of said sale of the mortgaged property and premises hereinbefore directed to be made as augmented by the said three hundred dollars received at the time of said release, shall not be sufficient to pay all of the said costs, expenses, fees and compensations hereinbefore directed to be paid out of said proceeds of sale added to the said three hundred dollars, and the full amount of said mortgage debt, as hereinbefore fixed and determined, with interest on said debt from the date hereof, that then the said Wertheimer, as such receiver, shall without further order, pay and discharge out of said one hundred and twenty-five thousand dollars of insurance moneys, an amount sufficient to pay and

discharge the unpaid balance of said expenses, costs, fees and compensation, if any, and also any deficiency, after the application of the proceeds of said sale and said three hundred dollars as aforesaid, which may remain due on the said ninety bonds not owned by said Wertheimer, and on the coupons thereof, and interest on the said bonds and coupons as fixed and determined in the manner hereinbefore specified, with interest from the date hereof, all such payments to be made in the manner and to the persons hereinbefore specified in regard to payments out of said proceeds of sale and said three hundred dollars; and, if, upon making such payments, there shall remain in the hands of said Wertheimer any balance of said one hundred and twenty-five thousand dollars that the said Wertheimer shall forthwith pay over the same to the said Penn Plate Glass Company without further order.

It was further ordered and decreed, that in case there shall be any deficiency upon the amount of the entire mortgage debt, as fixed in the manner hereinbefore specified, with interest thereon from date hereof, after making the payments hereinbefore provided, all damages and moneys which may be due and be paid from and by said Pennsylvania Railroad Company by virtue of the said taking and condemnation of a part of the mortgaged property as hereinbefore recited shall be applied, (1) to the payment of the costs, expenses and charges of the complainant incurred in the said condemnation proceedings, or in any other proceeding taken for the purpose of collecting such damages, including its own compensation and a reasonable fee for its counsel, for their services in said condemnation or other proceedings, as the same may be fixed; and (2) to the payment of such deficiency on the entire mortgage debt, with interest thereon, in full, if the said damages and money are sufficient, and, if they are not sufficient then to the payment of the same *pro rata*, any part of the said mortgage debt which may still remain due and unpaid upon the said ninety bonds not owned by said Wertheimer as hereinbefore recited, and the coupons thereon and interest on the same, to participate *pro rata* with the balance of the said mortgage debt in the said distribution of said damages and moneys so collected by reason of said taking and condemnation, and the defendant, the said Penn Plate Glass Company and W. L. Kann are hereby ordered and directed to pay to the complainant herein, without further order of this court, such amount of the said damages arising from said condemnation of said mortgaged premises and property which may be paid to them, or either of them, as may be necessary to pay (1) said costs, expenses and compensation; and (2) any deficiency which may remain upon said entire mortgage debt, with interest as aforesaid. If after making the above payments there shall remain any surplus of the said damages and moneys so to be collected from said railroad company, the same shall be paid to the Penn Plate Glass Company.

It was further ordered, that any party to this proceeding may apply to the court for further orders and directions at the foot of this decree," as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by

virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of September, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that so much of the decree of the said circuit court as relates to the disposition of the insurance moneys collected by the receiver under the order of the court be reversed with costs, and that the said respondent, The Penn Plate Glass Company, recover against the said complainant, The Farmers' Loan and Trust Company, trustee, forty-one dollars and fifteen cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter a decree that said moneys shall be paid to the said defendant, The Penn Plate Glass Company, with costs under the said supplemental bill.

Philadelphia, June 19, 1900.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the eighth day of August, in the year of our Lord one thousand nine hundred.

*Costs of Penn Plate Glass Co.*

| | |
|---|---|
| Clerk | $21.15 |
| Printing record | |
| Attorney | 20.00 |
| | $41.15 |

WM. H. MERRICK,
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

256 United States Circuit Court of Appeals, Third Circuit, September Term, 1899.

*Costs of Penn Plate Glass Company in No.* 19.

| | |
|---|---|
| 1899, September term.—Docketing cause and filing record, $5.00; appearance, .50; filing precipe and receipt, .75; filing papers, $1.00; filing briefs, $5.00; order, .20; argument, .20; continuance, .25 | $12.90 |
| 1900, March term.—Transfer, $1.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; attorney's docket fee, $20.00; costs and copy, .40 | 28.25 |
| | $41.15 |

Fee Book 2, page 245.

Test:

WM. H. MERRICK,
*Clerk Circuit Court of Appeals, 3d Circuit.*

Endorsed: U. S. circuit court of appeals, third circuit. No. 19. Sept. term, 1899. Penn Plate Glass Company, appellant, *vs.* Farmers' Loan and Trust Company, trustee. Mandate.

257 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify that the foregoing pages, from one to two hundred and fifty-six, inclusive, of volume two, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of The Penn Plate Glass Company and Wm. L. Kann, appellants, and The Farmers' Loan and Trust Company, trustee, appellee, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-second day of October, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
*Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Penn Plate Glass Company and William L. Kann are appellants and The Farmers' Loan & Trust Company, trustee, is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

259 do hereby command you that you send, without delay, to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

260 [Endorsed:] File No., 17,942. Supreme Court of the United States. No. 457, October term, 1900. The Farmers'

Loan & Trust Co., trustee, *vs.* The Penn Plate Glass Co. *et al.* Writ of certiorari.

261 THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN, Appellants,
*vs.*
THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Appellee.

The Supreme Court of the United States having issued a writ to the honorable the judges of the United States circuit court of appeals for the third circuit, under date the 20th day of November, in the year of our Lord one thousand nine hundred, commanding said judges of the United States circuit court of appeals for the third circuit to send, without delay, to the said Supreme Court the record and proceedings in the cause in which The Penn Plate Glass Company and William L. Kann are appellants and The Farmers' Loan and Trust Company, trustee, is appellee, so that the Supreme Court may act thereon:

Now, it is stipulated and agreed on behalf of the said Penn Plate Glass Company and William L. Kann that the certified copy of the transcript on file in the Supreme Court may be taken as a return to the said writ.

Dated November 21st, 1900.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
*Att'ys for Penn Plate Glass Co. & W. L. Kann.*

HERBERT B. TURNER,
*For F. L. & T. Co.*

262 UNITED STATES OF AMERICA, *set:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties, thereto annexed, as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-seventh day of November, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
*Clerk U. S. Circuit Court of Appeals, Third Circuit.*

263 [Endorsed:] File No.. 17,942. Supreme Court U. S., October term, 1900. Term No., 457. The Farmers' Loan & Trust Co., petitioner, *vs.* The Penn Plate Glass Company *et al.* Writ of certiorari and return. Filed Nov. 28th, 1900.

OCT 24 1900
JAMES H. McKENNEY

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# Supreme Court of the United States.

October Term, 1900.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
*Petitioner,*

*vs.*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

HERBERT B. TURNER,
JOHN G. JOHNSON,
J. S. FERGUSON,
*Solicitors and of Counsel for Petitioner.*

# Supreme Court of the United States,

OCTOBER TERM, 1900.

No.

THE FARMERS' LOAN & TRUST COMPANY, Trustee,
Petitioner.

*vs.*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable the Justices of the Supreme Court of the United States:*

The petition of The Farmers' Loan and Trust Company, a New York corporation and citizen of said State, respectfully represents to your Honors as follows:

This is an application for a writ of certiorari to the United States Court of Appeals for the Third Circuit, which reversed by a vote of two to one a decree of the United States Circuit Court in the above entitled cause. As will appear, two Judges, Judge Buffington, sitting in the

Circuit Court, and Judge Acheson, sitting in the Court of Appeals, have sustained the contentions of the petitioner, but Judge Gray and Judge Dallas, sitting in the Court of Appeals, have taken the opposite view and have ordered the reversal of the decree of the Circuit Court. Moreover, the Court of Appeals, after full argument, before rendering any decision, and after having the case under consideration for a number of weeks, ordered a re-argument of the case of its own motion. These facts, it is submitted, go far to show that the case is one of gravity and importance and that the petition should be granted.

## STATEMENT.

On January 1st, 1891, the Pennsylvania Plate Glass Company, a Pennsylvania corporation, made a mortgage to Petitioner to secure bonds amounting to $250,000, to foreclose which the original bill herein was filed. The mortgage covered the working plant of the Mortgagor Company in Irwin, Pennsylvania, with certain contracts and other property, real and personal, then owned or thereafter to be acquired, including rents, issues and profits (Rec. Vol. 1, pp. 18 to 39). The defendants named in the original bill included the above-named respondents and the Pennsylvania Plate Glass Company, the Mortgagor Company.

Before the foreclosure and in March, 1894, a suit was brought in the Court of Common Pleas of Westmoreland County, Pennsylvania, at the instance of the directors, against the Pennsylvania Plate Glass Company to procure its judicial dissolution, and Joseph W. Stoner was appointed Receiver. In that suit an order was subsequently made for the sale of the property by the Receiver *subject to the lien of the said mortgage for two*

*hundred and fifty thousand dollars.* Accordingly, June 18, 1894, the Receiver sold the property so subject at public auction. The property, it will be noted, was not sold subject to any possible claim which might be proved to exist, but to this particular mortgage for this specified amount of two hundred and fifty thousand dollars fully described in the terms of sale. The defendant, W. L. Kann, became the purchaser, the price being only $37,500, and in pursuance of this sale a deed was by order of the Court given July 2d, 1894, by the Reciver to Kann. The deed distinctly and in accordance with the express terms of the order recited that the conveyance was made " *subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for Two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

Mr. Kann paid the interest on all the bonds represented by the coupons which fell due July 1, 1894, and January 1, 1895 (Rec., Vol. pp. 69 to 71). These were the last coupons paid, for on the first of July, 1895, a new company, the respondent, the Penn Plate Glass Company, was organized by Mr. Kann to receive a deed of the property from him, and to carry on the business, and that company, or rather Kann, its president acting in the name of that company, deliberately permitted the coupons falling due on the same day to be defaulted. The fact that this new company took a name calculated to confuse parties with whom it might deal and make them suppose that it was in fact the Pennsylvania Plate Glass Company, writing the first word of its name with the customary abbreviation, will readily appear to anyone. The Penn Company never paid a cent of interest upon

10 the bonds, although the deed given to it by Kann July 1, 1895, the very day of the first default, expressly recited, as did the deed to Kann himself, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for Two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

Defaults being made in the payment of coupons, the Trust Company served written demands for their payment upon the defendants, the Pennsylvania Plate Glass Company, W. L. Kann, the Penn
11 Plate Glass Company and Joseph W. Stoner, Receiver. (Rec., Vol. 1, pp. 126, 127.) Six months having elapsed and these defaults still continuing, the Trust Company, still following the terms of the mortgage, by written instruments declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., Vol. 1, p. 72), and two days later, July 8, 1896, it filed its original bill for the foreclosure of the mortgage.

No defense was made by the Mortgagor Company, but the respondent Kann, who had bought the property subject to the mortgage, for only $37,500, and had organized the new Company as
12 aforesaid, and also the new company so formed, both saw fit to defend the suit and filed demurrers.

On their demurrers being overruled, they filed a joint and several answer. (Rec., Vol. 1, pp. 45 to 58.) This was done by the same attorneys. Whether Kann in this litigation acts in his own name or in the name of the Penn Plate Glass Company, he acts through the same attorneys.

In July, 1896, at the beginning of the foreclosure suit, *the complainant made a motion for a receiver.* It was a trustee without funds, the bond-

holders were scattered, the mortgagor corporation 13
was insolvent, the property was in the possession of the respondent, the Penn Plate Glass Company, hostile to the mortgage interests, and the principal of the mortgage, being $250,000, had matured as well as some instalments of interest. No doubt the Court below would have granted this motion had it not been for the strenuous opposition made by the two re-respondents. The receivership was desired, among other things, for the purpose of protecting the property from loss by fire, and the danger of such loss was strongly urged upon the Court as a ground of its taking possession of the property and effecting insurance for the benefit of whom it might 14
concern. Whether the parties in possession of the property were bound to insure for the benefit of the bondholders, made no difference whatever. When the Court took possession of the property, as it surely ought to have done, it would become its duty to protect the property for the benefit of whom it might concern, and the failure of the Court below to perform this, its evident duty, resulted in a loss of the greater part, if not all, of the bonded indebtedness.

For, on April 12, 1898, while the respondent, the Penn Plate Glass Company, remained in possession of the property and was obstructing the decree of 15
foreclosure and sale, which has since been entered, (and the fact that, so far as the decree ordered foreclosure and sale it is correct is admitted by all parties), the greater portion of the mortgaged property was destroyed by fire. The respondents had continued to refuse to insure for the benefit of the bondholders, although the trustee, your petitioner, had repeatedly demanded that they should do so. On the contrary, they insured the property for the benefit of the Penn Plate Glass Company to the amount of some

three hundred and fifty or four hundred thousand dollars, so that if none of this insurance can go to the bondholders, the respondents are absolutely benefiting by the fire to the extent of the mortgage.

It is fair to state that when these respondents effected this insurance, they caused the insertion in each policy of a provision to the effect that the property was subject to a bonded indebtedness of $250,000, and that it was to be understood that the insurance did not cover the interest of the bondholders. But this provision was, of course, simply an agreement between the insurers and the insured, and in view of the fact that the insurance companies paid over the insurance moneys to the receiver of the U. S. Circuit Court, appointed for that purpose in this cause, that provision has nothing to do with the issues in the present case. Moreover, that clause was an admission by the respondents of the validity of the mortgage and the amount of the bonded indebtedness, by denying which thereafter, for the purpose of obstructing the foreclosure, they succeeded in delaying the sale, and thus caused the loss to the bondholders to arise.

This property, being insured to an amount equal to its entire value, and being mortgaged for $250,000, is destroyed by fire, and in its stead remains its entire value in insurance money. The petitioner claims that it is entitled to a decree, such as was rendered by the trial Court below, to the effect that any deficiency that might be found after the sale of what little is left of the mortgaged property, should be paid out of the insurance funds.

If the decision of the Court of Appeals stands unreversed, the Penn Plate Glass Company will profit to a very large extent at the expense of the bondholders by reason of this fire, which will to them a mort fortunate catastroyhe. Kann

bought the property for $37,500, expended, as he 19
claims, money upon it to increase its cost to him to not more than $83,500, at which last figure the conveyance was made to the Penn Company. Subsequently the Penn Company made improvements, so that the cost to it amounted to $118,000 (Record, Vol. 1, p. 483). This property the Penn Company insured for some $450,000, and it proposes to collect the insurance without paying the bonds!

After the fire took place the petitioner hastened to file its supplemental bill making the insurance companies parties defendant, the object being to impress the lien of the mortgage upon the insurance fund. (Rec., Vol. 2, pp. 3 to 24.) Demurrers 20
of the respondents were overruled (Rec., Vol. 2, pp. 24 to 35) and thereupon the respondents answered. (Rec., Vol. 2, pp. 35 to 45.) Replication was filed and testimony taken on both sides. A receiver of the insurance moneys was appointed by by the Court.

The final decree was rendered July 25, 1899, by the Hon. Joseph Buffington, District Judge. (Rec., Vol. 2, p. 187.) This decree ordered the foreclosure of the mortgage and a sale of the property unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master 21
to ascertain and report which of the bonds were entitled to the security of the mortgage, etc., and whether the sale of the property as an entirety, &c., and the decree further held that the trustee complainant was entitled to an equitable first lien upon the insurance moneys to the extent of all the valid outstanding bonds secured by the mortgage, etc.

The District Judge filed an able and elaborate opinion sustaining the decree in favor of the complainant. The present respondents appealed and

22 the decree of the Circuit Court was reversed by the action of Judges Gray and Dallas, Judge Acheson dissenting. There is, therefore, an equal division of opinion between the Judges who have passed upon the questions affecting the insurance moneys in this case, Judges Buffington and Acheson sustaining our position, and Judges Gray and Dallas opposing it, the action of these latter Judges, however, controlling the Court of Appeals so that we come before this Court with a decree reversed, to argue for a writ of *certiorari*.

The original decree should be sustained, and the action of the Court of Appeals should be reversed
23 for the following reasons :

I.

There was a covenant on the part of the mortgagor to insure whenever required by the trustee of the mortgage. The latter made such requirement. Such insurance was necessary for the benefit of the trustee. It was an equivalent for the insurance which at its option the trustee might take out itself. Of course, it would not have taken out such insurance for the benefit of the mortgagor. It
24 would have been folly to have stipulated for the taking out of insurance by the mortgagor in its own name when the mortgage provided that there would be no personal liability for the payment of the mortgage debt by the mortgagor in favor of the bondholders.

II.

The conveyance to the Penn Plate Glass Company being "subjected to the mortgage" imposed upon the grantee the duty to indemnify the mort-

gagor, the Pennsylvania Company, against all liability upon the covenants of the mortgage. The Penn Plate Glass Company therefore became bound to indemnify the mortgagor against damages by reason of the breach of the covenant by the latter to insure when required. 25

III.

Inasmuch as the Penn Plate Glass Company did insure in pursuance of its duty so to do by way of indemnification of the Pennsylvania Company, the fund resulting from the proceeds of such insurance is impressed to such an extent as is necessary to indemnify the mortgagor with the duty of such indemnification. The mortgagor would be entitled to sue the Penn Plate Glass Company because of its failure to take out insurance if none had been taken out. The insurance having been taken out by the Penn Plate Glass Company, in pursuance of its duty, a Court of equity will not turn the Pennsylvania Company over to an action at common law for breach, but will impound the insurance money resulting from the performance of the duty incumbent upon the grantee. 26

IV. 27

The fund arising from the insurance being impressed in equity with the duty in favor of the mortgagor to indemnify, the latter under its covenant to insure is subject to the right on the part of the morgagee to enforce as against the fund the duty incumbent upon the mortgagor, namely, to appropriate it in relation to the covenant to insure.

As between the mortgagor and the Penn Plate Glass Company, the latter is the principal in the

28 obligation to insure, and the former the surety. The person entitled to performance of the covenant, *i. e.*, the trustee of the mortgage, has a right to demand the appropriation for its benefit of the fund which is collateral security for the obligation of the title.

Equity avoids circuity of action, and if it appears that a fund is charged with a duty, it will enforce that duty for the benefit of everybody directly or indirectly entitled to compel performance.

## V.

29 Apart from the above propositions the Penn Plate Glass Company became bound to insure by virtue of its retention of possession of the premises.

A default occurred which entitled the trustee to demand possession. Such possession was demanded. Had it been given, insurance could have been effected out of the income, rents, etc. It became the duty of the Penn Plate Glass Company in consequence of its continued occupancy and deprivation of the trustee of its right of occupancy, to appropriate the income to an insurance of the premises. Had it used the income in procuring the
30 insurance, the latter would have been stamped with a trust in favor of the trustee. The fact that it is impossible to trace the income directly into the purchase of the insurance does not deprive the mortgagee held out of possession, of its right, where insurance was taken out, to insist that it became entitled thereto because of the duty to insure.

It may further be added that inasmuch as the Court below refused to take possession and appoint a receiver and was induced to take such course by vigorous opposition to the motion made

by the Penn Plate Glass Company, that company must be considered as in the position of a receiver in possession and charged with the duty of effecting insurance. 31

When the receivership was denied, the Court below exacted a bond from Kann and Wertheimer to the effect that if it was the duty of the Penn Plate Glass Company to insure, the insurance should inure to the benefit of the trustee of the mortgage. It was a positive agreement by these men that out of the proceeds of any insurance money which should be collected, the bonds could be paid. Had the Penn Plate Glass Company itself thus agreed, there would be no doubt of its duty to appropriate the insurance for the benefit of the trustee. 32 Though Kann and Wertheimer made the covenant, which was that the bonds should be paid out of the insurance fund of the Penn Plate Glass Company, the latter Company obtained the benefit of this fund and thereby became unquestionably estopped from denying the right of the trustee to appropriate the insurance money, if there was a legal duty upon the Penn Plate Glass Company to insure.

The condition was not merely if it was its duty to insure under the mortgage but also under the deed to it. We have already shown that there was such duty. It follows that the insurance 33 money should be impounded.

Your petitioner avers that it is advised by counsel that the questions arising in this litigation are of very great importance, so important, indeed, that they should, as your petitioner respectfully submits, obtain from your Honors a review of the said decision of the said Circuit Court of Appeals for the Third Circuit by and on certiorari; that such hearing on certiorari of this cause is essential and is specially proper in view of the fact, as above stated, that there is an equal division in

34 opinion between the four Judges of the Courts to which this cause has been submitted for determination. This application has been prosecuted with all possible diligence, inasmuch as the decision of the Honorable Circuit Court of Appeals for the Third Circuit, of which your petitioner seeks to obtain a review by certiorari, was not rendered by said Court until after the adjournment of this Court for the October Term of 1899, so that the decree of said Circuit Court of Appeals did not become final until after the adjournment of this Honorable Court.

That owing to the inability of your petitioner to present this application to your Honors immedi-
35 ately upon the reversal of the decree of the Circuit Court by the said Appellate Court, for the reason that this Honorable Court was in vacation at that time, the mandate of said Honorable Circuit Court of Appeals for the Third Circuit has issued to the Circuit Court of the United States for the Western District of Pennsylvania, and petitioner therefore desires that said mandate be recalled as hereinafter prayed for.

Your petitioner files herewith a copy of the opinion of the Circuit Court of Appeals, a copy of the dissenting opinion of the Honorable Judge Ache-
36 son, a copy of the opinion of the Honorable Judge Buffington filed on the rendering of the decree of the Circuit Court, and also copies of the record and of the brief filed by your petitioner in the Court of Appeals.

Wherefore your petitioner prays that a writ of certiorari may issue to the said Honorable The Circuit Court of Appeals for the Third Circuit, to bring up for review before your Honors the judgment and decree of said Court in the cause entitled The Penn Plate Glass Co. and Wm. L. Kann, appellants vs. The Farmers' Loan and Trust Com-

pany, Trustee, Appellee, Number on the docket 37
of said Honorable Court, and that your Honors will issue an order directing the said Honorable Circuit Court of Appeals to recall its mandate, and to hold the same subject to the orders and decrees of this Honorable Court and until your Honors can hear and pass upon such writ of certiorari; and your petitioner prays that upon the hearing of said writ of certiorari, so to be issued, your Honors do quash and reverse the decree of said Circuit Court of Appeals for the Third Circuit, and do render a decree that the decree of the United States Circuit Court for the Western District of Pennsylvania in the cause aforesaid be affirmed with costs, and that your petitioner shall have such 38
other and further relief in the premises as may be just.

Respectfully submitted,

HERBERT B. TURNER,
JOHN J. JOHNSON,
J. S. FERGUSON,
*Solicitors and of Counsel for the Petitioner.*

STATE OF NEW YORK, *County of New York*, } ss.:

Personally came and appeared before me, the 39
undersigned authority, Edwin S. Marston, who being duly sworn, deposes and says, that he is the President of the Farmers' Loan and Trust Company, the petitioner in the above petition, and that all the facts, matter and things therein set forth are true to the best of his knowledge, information and belief.

E. S. MARSTON.

Sworn to and subscribed before me this 16th day of October, 1900.

W. B. CARDOZO,
[SEAL.] Notary Public No. 18,
New York County.

No. 1189 Sup. 180.

Br. of Turner & Johnson for Pet

Supreme Court of the United States.

Filed Oct. 24, 1900.

October Term, 1900.

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THE FARMERS' LOAN AND TRUST COMPANY, Trustee,

*Petitioner,*

*vs.*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,

*Respondents.*

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# Brief for Petitioner

## On Motion for Writ of Certiorari.

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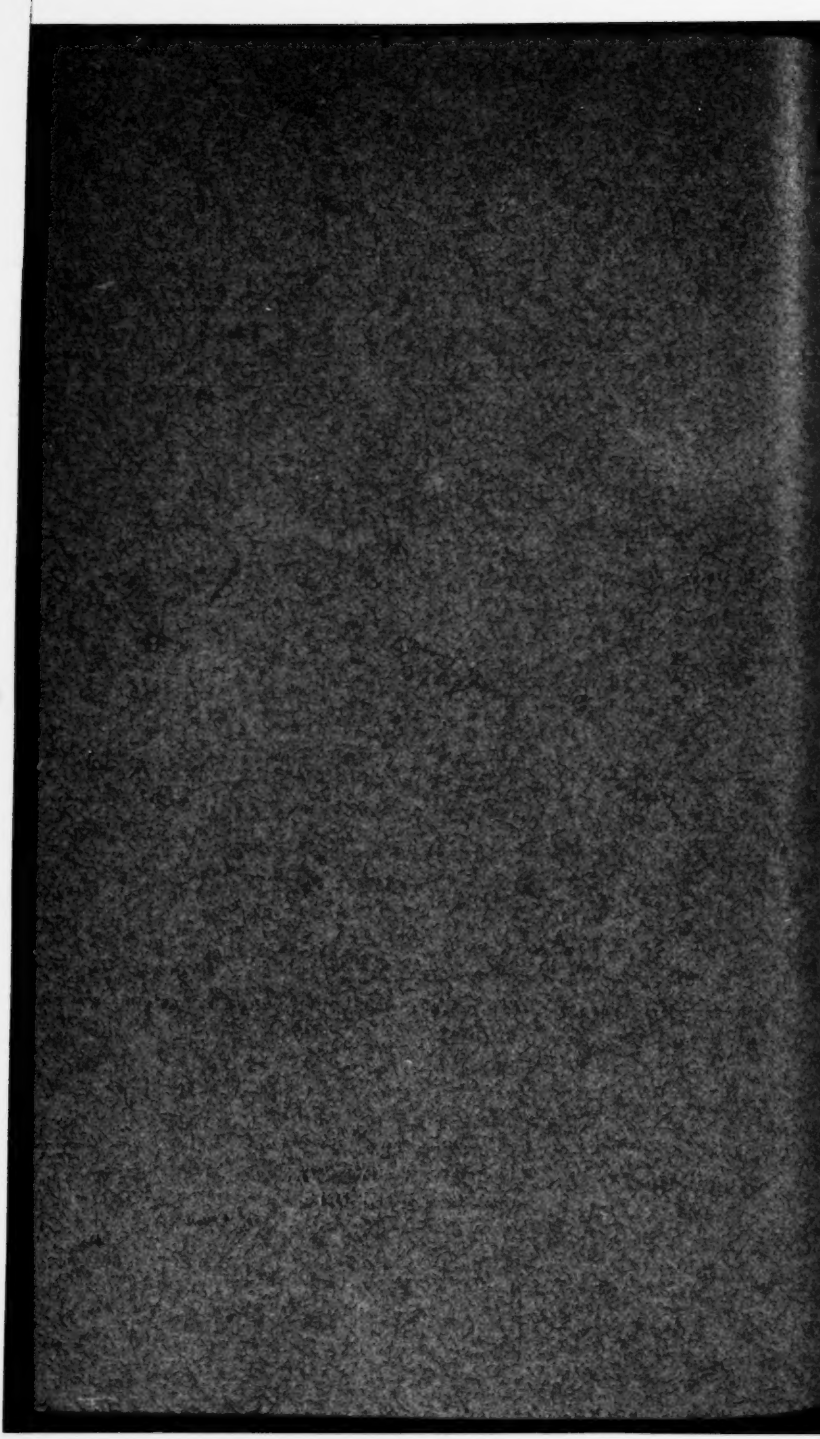
HERBERT B. TURNER,
JOHN G. JOHNSON,
J. G. FERGUSON,

*Of Counsel.*



# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FARMERS' LOAN AND TRUST COMPANY,
Petitioner,

*against*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,
Respondents.

**Brief for Petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.**

The Petitioner submits herewith, and as a part hereof, its brief as appellee in the Circuit Court of Appeals, simply prefixing to said brief the following suggestions:

The Petitioner, being the trustee under a mortgage made by a corporation to secure a series of bonds, filed a bill to foreclose said mortgage, the principal and interest being due. The suit was vigorously opposed in every way by able counsel representing the defendant corporation, which through assignment became the owner of the property, subject to the Petitioner's mortgage, and also representing the president of that corpor-

ation individually, he having, for reasons which will appear in the complaint, been made party defendant. In every possible way these parties opposed the Petitioner in obtaining a decree of foreclosure and sale, delaying the progress of the cause for more than a year by taking testimony and in other ways. At the beginning of the litigation, when a motion for a receiver was made by the complainant, the present Petitioner, these same parties successfully opposed the motion, although the principal of the mortgage debt had matured and several instalments of interest were due, and although they refused to insure the property for the benefit of the bondholders. That they were bound to effect such insurance, we insisted and they denied.

While the defendants were in possession of the property--left in possession by reason of the failure of the Court below to grant a receiver—the mortgaged property was almost entirely destroyed by fire. The defendant corporation, being the party in possession, had effected insurance to an amount more than equal to the *entire value* of the property.

The Petitioner insists that inasmuch as the motion for a receiver was denied by reason of the opposition of the parties defendant, and inasmuch as the Court below erred in such denial, the defendants should be regarded as receivers in possesssion, and the insurance which was effected should, so far as is necessary, be applied to the discharge of the mortgage debt.

There is an eminent justice in this. Any other course will simply enable these parties to profit very largely by their own wrong and themselves to collect the amount of the mortgage debt, and not pay it over to those to whom it is due. Had there been no fire, this amount of two hun-

dred and fifty thousand dollars indebtedness would still be charged upon this valuable and undestroyed property, property which the defendants admit was charged with the amount of the mortgage. The fire taking place, however, and the property being fully insured, these defendants, if the decree of the Court of Appeals is to be followed, will collect not only the value of their own interest in the property but also the value of the mortgage itself.

Evidently this cannot be law or equity, and it is certainly not justice. The Court should correct the error of the Court below in refusing the receivership, when it can do so now without any loss to the parties defendant.

The questions which arise in the discussion of this case are of gravity and importance. The very fact that the Circuit Court of Appeals, after hearing two counsel on each side and after holding the case for weeks, ordered a new argument of its own motion, is of itself quite sufficient to show the gravity and importance of the case. To this consideration may be added the fact that the bondholders are practically without remedy, and their security almost entirely, if not entirely, gone, unless the insurance moneys can be applied as their application was ordered by the decree of the Circuit Court, which decree has the approval of the opinion of one of the Judges of the Court of Appeals.

The brief submitted to the Court of Appeals, a copy of which is annexed, is very full, and it is not deemed necessary to add anything more on submitting this Petition.

HERBERT B. TURNER,
JOHN G. JOHNSON,
J. S. FERGUSON,
Solicitors and of Counsel for Petitioner.

# Circuit Court of Appeals of the United States,

## THIRD CIRCUIT.

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|---|---|
| THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Appellee, *against* THE PENN PLATE GLASS COMPANY, Appellant, THE PENNSYLVANIA PLATE GLASS COMPANY, and WILLIAM L. KANN. | In Equity. |

## BRIEF FOR APPELLEE.

This is an appeal taken by the defendant, the Penn Plate Glass Company, from a decree of foreclosure and sale rendered by the Circuit Court of the United States for the Western District of Pennsylvania, in favor of the complainant, The Farmers' Loan and Trust Company, as Trustee, against the defendants.

### Statement.

On January 1st, 1891, the Pennsylvania Plate Glass Company, a Pennsylvania corporation, made

a mortgage to The Farmers' Loan and Trust Company, a New York corporation, to foreclose which mortgage the original bill herein was filed. The mortgage covered the plant of the mortgagor company, being a specified tract of land in Irwin, Westmoreland County, Pennsylvania, with certain gas and water contracts, and all the company's other property, real or personal, then owned or thereafter to be acquired, including rents, issues and profits (Record, Vol. I, pp. 18–39).

This mortgage was given in trust to secure six per cent. bonds which were issued to the amount of $250,000 of principal.

On the 19th of March, 1894, a suit was brought in the Court of Common Pleas of Westmoreland County, at the instance of the directors, against the Pennsylvania Plate Glass Company to procure its judicial dissolution. In that suit Joseph W. Stoner was on that day appointed Receiver of the Company. An order was subsequently made for the sale of the property by the Receiver *subject to the lien of the existing mortgage for $250,000.* Accordingly, on the 18th of June, 1894, the Receiver sold the property so subject to the mortgage at public auction. The property, it will be noted, was not sold subject to any possible claim that might be proved to exist, but to this particular mortgage, for this specified amount of $250,000, fully described in the terms of sale. The defendant, W. L. Kann, was the purchaser, the price being $37,500. On July 2d, 1894, a deed was, by order of the Court, given by the Receiver to Kann. It distinctly and in accordance with the express terms of the order, recited that the conveyance was made "*subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

This, of course, was the mortgage now in process of foreclosure. No objection seems to have been made by anyone to this reservation in the deed, nor does it seem to have occurred to anyone at that time that the validity of the mortgage and the amount due thereunder could ever be questioned.

Mr. Kann himself did not seem inclined to raise any such questions, for when the property came into his hands, he paid the interest on all the bonds represented by the coupons which fell due July 1st, 1894, and January 1st, 1895 (Rec., Vol. I, pp. 69, 71). These were the last coupons paid. For, on the 1st of July, 1895, a new company, *just organized by Mr. Kann*—the Penn Plate Glass Company, which now appears as appellant—received a deed of the property from Kann; and it deliberately permitted the coupons *falling due on that same day* to be defaulted. The Penn Company has never paid a cent of interest upon the bonds, although the deed given to it by Kann on the 1st of July, 1895—the very day of the first default—expressly recited, as did the deed to Kann, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company, of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1.*"

Upon the defaults in the payment of coupons, the Trust Company served written demands for their payment upon the defendants the Pennsylvania Plate Glass Company, W. L. Kann, the Penn Plate Glass Company and Joseph W. Stoner, Receiver (Rec., Vol. I, pp. 126–127). Six months having elapsed, and these defaults still continuing, the Trust Company, still following the terms of the mortgage, by written instrument, declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., Vol. I, p. 72), and two

days later, on the 8th day of July, 1896, it filed its Original Bill for the foreclosure of the mortgage.

*No defense was made by the Pennsylvania Plate Glass Company, the mortgagor.* But the respondent, W. L. Kann, who had bought the property, as we have said, expressly subject to the mortgage, for the sum of $37,500, and who, having paid two of the coupons on the bonds, had formed a new company to take the title and to default in the payment of interest, of which new company he became the president; this man Kann and the appellant, the Penn Plate Glass Company, the new company so formed, which had received a deed of the property from Kann, subject to the mortgage, the consideration being stated as $83,500, both saw fit to defend the suit, to file demurrers to the bill, and, later on, to file a joint and several answer (Rec., Vol. I, pp. 45-58). Of course this was done by the same attorneys. Whether Kann carries on this litigation in his own name or in the name of the Penn Company, he acts through the same attorneys.

The demurrers were overruled (Rec., Vol, I p. 44). As the answer contained in our opinion much irrelevant and impertinent matter, the complainant filed exceptions thereto (Rec., Vol. I, pp. 58-62), which the Court overruled on grounds not affecting the merits of the controversy (see the Opinion sur exceptions, Rec., Vol. I, pp., 63-64). Thereupon replication was filed (Rec., Vol. I., p. 65), and the taking of testimony was begun on April 12th, 1897 (Rec., Vol. I, p. 65).

The complainant's testimony, practically completed by the 17th day of April, 1897, covers only 43 pages of the printed record (Rec., Vol. I, pp. 65-104, 126-128), but the defendants' testimony, begun on September 27th, 1897 (Rec., Vol. I, p. 128), and completed six months later, on March 31st, 1898 (Rec., Vol. I, p. 489), covers 372 pages of the printed record (Rec. Vol. I, pp. 128-500). Most

of this testimony was taken subject to our objection as to its relevancy and materiality.

In July, 1896, at the beginning of the foreclosure suit, the complainant being a trustee *without funds*, and the bondholders being scattered, the complainant made a motion for a Receiver, which the Court denied (Rec., Vol. I, p. 45). The receivership was desired, among other things, for the purpose of protecting the interest of the trustee and bondholders from loss by fire. This was expressly urged as one of the most important grounds for the Court's taking possession of the property on behalf of the trustee, and resulted in the giving by the defendants of an undertaking relative to insurance hereinafter more fully referred to. The Pennsylvania Plate Glass Company; its Receiver, Stoner; W. L. Kann, and the Penn Plate Glass Company had all failed to insure for the benefit of the mortgagee, and were neglecting and refusing so to do. as we shall point out more fully later. The desired relief having been refused, the property remained in the possession of the Penn Plate Glass Company, insured by it, to be sure, but not in terms for the benefit of the mortgage. Its policies, indeed, contained the following clause:

"This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders."

On April 12th, 1898, a very great portion of the mortgaged property was destroyed by fire (Rec., Vol. II, p. 19). The defendants, it will be remembered, had but just closed their testimony under the original bill (Rec., Vol. I, pp. 489, 500); so that at the time of the fire the complainant was still being prevented by the defendants, including this appellant, from obtaining a decree of foreclosure and sale, although they did not deny the validity of the mortgage, but only

the right of certain bondholders to share in its security, and under defences which have been overruled in the decree herein (Rec., Vol. II, pp. 187–200), and which the appellant has wholly abandoned on this appeal.

The complainant hastened to file its supplemental bill, the object of which was to impress the lien of the mortgage upon the insurance effected by the Penn Plate Glass Company (Rec., Vol. II, pp. 3-24). To this bill we made the Insurance Companies parties defendant. The defendants demurred to the supplemental bill as they did to the original bill, and these demurrers were also overruled by the Court (Rec., Vol. II, pp. 24–35). Thereupon the defendants filed a joint and several answer to the supplemental bill (Rec., Vol. II, pp. 35–45); replication was filed (*Id.* p. 45) and testimony was taken by both sides. A Receiver of the insurance moneys was appointed by the Court, and directed to collect and hold subject to the final order of the Court $125,000 of the insurance moneys, which the receiver has accordingly done. Wertheimer, the owner of one hundred and sixty of the bonds, having joined with the appellant, had stipulated that he would make no claim to the insurance. And hence the figure of $125,000 was fixed upon as being sufficient to cover the ninety minority bonds with interest and charges.

The final decree was rendered July 25, 1899, by the Hon. Joseph Buffington, District Judge. It is set forth on pages 187–200 of the Record, Volume II. It ordered the foreclosure of the mortgage and a sale of the property unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master to ascertain and report which of the bonds were entitled to the security of the mortgage, etc.; and ordered the sale of the proerty, as an entirety, etc. And the decree further held that the Trustee was entitled to an equitable

first lien upon the insurance and insurance moneys to the extent of all the valid outstanding bonds secured by the mortgage; and inasmuch as a Receiver of the Insurance moneys had been appointed under the supplemental bill, and a very large part thereof had been collected by him, the Court proceeded to order the application of such moneys to the payment of the bonded debt, etc. That part of the decree which relates to the insurance is contained on pages 197–199 of the Record, Volume II.

Inasmuch as counsel for the appellant have furnished us with their brief, we are able to confine our argument to those portions of the controversy which are covered by their assignment of error. The sole questions which are to be submitted to this Court, it seems, are, whether the Court below was right in sustaining our claim for a lien on the insurance moneys, and whether it was right in allowing interest on the defaulted coupons. Questions affecting our right to foreclose, elaborately argued in the Court below and overruled, seem to have been abandoned by counsel.

It will readily occur to the Court, upon examining the testimony, that the insurance companies might, perhaps, have contested the payment of so very large a sum of money if it represented the value of the equity of redemption alone, claiming that it appeared upon the face of the papers in this suit that there was no such insurable value in the property before it was burned beyond the amount of the mortgage. Bonds were outstanding to the amount of $250,000, and the testimony shows that Kann did not pretend to have paid more than $37,500 for it, or to have expended upon it, prior to turning it over to the appellant one year later, more than enough to bring the whole price with interest up to $83,500 the amount of the consideration named in the deed to the appellant. Even adding the full amount of the improvements carried out by the appellant under Kann's contracts, the cost of this equity in the property to

the appellant was only $118,000 (Rec. Vol. I, p. 483). The appellant's counsel seeking to show that the value of the equity covered by the policies was much greater than the above, quoted on page 46 of their brief some further testimony of Kann's which shows that *up to the date of his testifying* (which was in 1898) the appellant had spent about $200,000 in improvements. But it must be remembered that we are considering the value of the equity as stated in the policies, which the appellant's counsel argues strenuously were all taken out by Kann and the appellant "at the time of their respective purchases of the property" (Brief, p. 27). At that time, as shown above, the property, including the price paid at the Receiver's sale, had cost these parties only $118,000. These figures are eloquent, and speak for themselves when compared with the $450,000 of insurance claimed to have been placed *at that time* upon the *equity* alone. But even if we take the figure given by Kann as the full cost of the improvements, namely $200,000, and add the $37,500 paid for the property at the sale, there is still a long way to $450,000. And yet the property covered by the mortgage is the same property covered by the policies which, indeed, as we have pointed out, expressly declare "*this property*" to be covered by a mortgage of $250,000. The fact, then, that some $400,000 of insurance have been collected is one of very great significance. The insurance companies have paid in this fund and, under order of Court, a portion of it is retained by the Receiver to be paid to the party whom the Court decides to be entitled to it. Is this party the appellant, who in the policies themselves admits the existence of a mortgage lien of $250,000, and yet seeks to collect the *full* value of the destroyed property? Or is it the holder of the bonds whose mortgage covered the ruined plant?

Counsel for the appellant have prepared some 100 pages of a very elaborate brief in opposition to the position of the Court below. Much of it we beg to suggest, is irrelevant. The decree should be sustained for the following reasons:

1. The mortgage contained an agreement under the provisions of which the original mortgagor, the Pennsylvania Plate Glass Company, was bound to keep this property insured for the benefit of the complainant, the mortagee.

2. The mortgage creates a forfeiture on default in the performance of the covenant to insure, and that default has occurred under circumstances which impress the lien of the mortgage upon the insurance obtained by the owner of the property, the Penn Plate Glass Company, and forfeit that company's right to receive the insurance without paying the amount due on the mortgage.

3. There is an identity of interest between the mortgagor, Kann and the appellant which equity will recognize. The testimony shows that Kann wrecked the mortgagor company, and he should not be permitted successfully to carry out what the proofs show to be a well-defined plan to obtain this property for his reorganized company free of the mortgage and at the expense of the minority bondholders. In this connection, it must be remembered that Mr. Wertheimer, the holder of the majority bonds, has thrown in his interests with the defendants, and has aided them in fighting the trustee and the holders of the remaining bonds.

4. By the terms of their purchase, and under the circumstances of this case, the defendant Kann and the appellant bought the property subject to the mortgage and assumed the mortgage debt, or, at

least, agreed to indemnify the mortgagor for any liability upon the covenants of the mortgage ; and the Court below, having jurisdiction of the *res* and of the parties, had power, in order to prevent circuity of action, to enforce this obligation in the present suit.

5. Interest on coupons was properly allowed.

## ARGUMENT.

### I.

### The Mortgagor, The Pennsylvania Plate Glass Company, covenanted in the Mortgage to insure for the benefit of the Mortgagee.

The mortgage contains in the Tenth Article the following provision relating to insurance (Rec. Vol. I, p. 35) :

"It shall be no part of the duty of the party of the second part (the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same ; nor shall it be any part of its duty *to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance* or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made ; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

This provision is recited in the tenth paragraph

of the supplemental bill (R. c., Vol. II, p. 14). Now, what is it? Plainly a recognition of an *obligation* on the part of the mortgagor, the other party to the agreement, to do certain things for the benefit of the bondholders, things which every bondholder would naturally insist must be done for his security. Somebody must record the mortgage and keep the property insured. The trustee has no money belonging to the trust, and it cannot, therefore, be properly called upon to do these things which involve an expenditure of money. But the other party, the owner of the property, has all the trust funds, and all the income arising from the trust funds, and very properly, by entering into this agreement, contracts that it will do these things. By such contract it very materially increases the ease of negotiating its bonds, since it thus agrees to give the purchasers a protection to which they are entitled, and which they will always be inclined to demand. It agrees that if by any oversight it fails in its duty in this behalf, the trustee may require it to act.

Counsel for the appellant will argue that this provision does not amount to a covenant, and, in this connection, will allude to the solemn character of covenants. But what could be more solemn than such a provision coming near the end of an elaborate mortgage, duly signed and sealed with all the formalities of law—a provision, moreover, which enumerates in careful succession the several duties owed by the mortgagor to the mortgagee by virtue of the very nature of their relations? It must not be forgotten that the covenant to insure is accompanied here by a number of other covenants, every one of which imposes upon the mortgagor an obligation which could not possibly be the obligation of any other person save the mortgagor. How, in the face of this fact, can the appellant argue that the power given to the Trust Company to require insurance means anything but a promise on

the mortgagor's part to effect and preserve such insurance? We are not concerned with the mere technical meaning of the word "*covenant.*" Call this provision what you will—covenant, agreement, stipulation—it is none the less a *contract* which binds the mortgagor and imposes upon it an obligation from which it cannot escape.

The language of the Court below on this subject is very clear and forcible (Rec. Vol. II, pp. 175-6).

"There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, The Pennsylvania Plate Glass Company, in its mortgage, enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilling of such requisition upon itself it imposed it upon no one. Indeed, the nature of the acts which the trustee was impowered in its discretion to require, shows that they were such as the mortgagor would naturally perform.

"Thus the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are, therefore, of opinion that by the terms of the mortgage the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced by the State Court during the receivership by its issue of receiver's certificates for the purpose.

These policies were in force when Kann purchased. The proofs show they were turned over to him, and he was informed by the receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months vesting a right of entry and possession in the trustee, we next inquire what was the relation to this duty of a successor in the possession and title of the mortgagor to whom such possession was delivered and the equity of redemption conveyed by an order of Court and deed based thereon, in the terms set forth in the foregoing opinion on the original bill?"

The appellant's counsel take the position in their brief (Appellant's Brief, pp. 57–59) that even if this be a covenant to insure, it is not a covenant to insure for the benefit of the mortgagee. To sustain this rather singular view, they cite an English decision by Kindersley, V. C., *Lees* vs. *Whiteley*, L. R., 2 Eq., 143. But the reasoning of the Vice-Chancellor is not very cogent. He seems to have thought that the presence of such a stipulation in the mortgage before him might be accounted for on some other theory than that it was demanded by the mortgagee as a covenant to insure *for his benefit;* and he suggests that there is some advantage to the mortgagee in getting the mortgagor to insure, although for the latter's sole benefit, "because it is for the interest of the mortgagee that his mortgagors should be in a solvent condition, and that, in case their property should be destroyed by fire, they should still have the means of paying the mortgage debt." This seems to us to be really only another way of saying that the insurance covenant *was* a covenant to insure for the benefit of the mortgagee; for had it been *expressly* such a covenant and had the mortgagor placed the insurance in his own name alone and collected the insurance, the only means open to the mortgagee to avail himself of the covenant would have been by a suit against the mort-

gagor individually. But if the remark of the Vice-Chancellor were otherwise warranted, it would still remain difficult to understand why a party should insert a provision such as the Vice-Chancellor construes this one to be, in a *mortgage*, which is an instrument designed to create a *security* for a debt, and not the debt itself, and which is taken by the mortgagee for the express purpose of saving himself from the necessity of being concerned about the solvency or insolvency of the mortgagor. His object is to get an indestructible *lien* on the property. And therefore to construe a clause which obviously is designed to protect his *lien* into a clause which has no regard whatever towards the *lien*, but looks only towards the *debt*, is to strain the meaning of language and to make a new contract for the parties, which the learned Judge expressed his desire not to do.

But, again, if the argument had any force as applied to the instrument then before the Vice-Chancellor, which was merely a bill of sale of certain machinery to secure an advance, yet it would have no application to such an instrument as the present one—a mortgage of a plate glass plant, full of stipulations even in the very clause containing the insurance covenant, looking wholly towards the better securing of the *lien*;—a mortgage, moreover, bearing semi-annual interest and thus placing it fully within the power of the mortgagee to know when the mortgagor should become insolvent. Besides all this, if the contention pressed by the appellant's counsel (Appellant's Brief, pp. 99-100) is correct, namely, that Article Fourth of the mortgage excludes all personal liability of the mortgagor and leaves the mortgagee wholly to the *lien* created by the mortgage, then it is apparent that the reasoning of Vice-Chancellor Kindersley is inapplicable; for, in such event, the solvency or insolvency of the mortgagor could not possibly interest the mortgagee, who under no circumstances could then come against

the mortgagor personally; and hence the clause in the mortgage with reference to insurance could not be construed as Vice-Chancellor Kindersley construes it, and would necessarily have to be explained on the theory that it was a covenant to insure for the benefit of the mortgagee.

The covenant here was not a naked promise to insure. The language surrounding it evinces very clearly that it was a covenant peculiarly for the benefit of the mortgagee and peculiarly within the power of the mortgagee to enforce.

## II.

**The Mortgage provides for a Forfeiture upon a Default in the Performance of the Covenant to insure. That Default has occurred under Circumstances which impress the Lien of the Mortgage upon the Penn Plate Glass Company's Policies and forfeit that Company's Right to receive the Insurance without paying the Amount due on the Mortgage.**

The mortgage contains in the Second Article a provision to the effect that in case of a default, among other things, "in the performance of any *covenant, agreement or stipulation*" contained in the mortgage and thereby "required to be kept and performed" by the mortgagor company, and the continuance of such default for the period of six months after demand made in writing by the trustee upon the mortgagor company for the performance of said covenants, it shall be lawful for the trustee, personally, or by its attorneys or agents, to enter upon the mortgaged premises and to evict

the mortgagor company and to operate the plant (Rec., Vol. I, p. 25). Under similar conditions, the mortgage gives the complainant the right to sell the property, and by such sale perpetually to bar all claims of the mortgagor company and of *all other persons claiming by, through or under it* (Rec., Vol. I, pp. 26-27). And under similar circumstances the mortgage gives the complainant the further right to bring suit to foreclose the mortgage (Rec., Vol. I, p. 28).

Now, *as a fact*, there was a failure on the part of the mortgagor company, and of those taking under it, to carry out any of the covenants or stipulations in the mortgage, *including the covenant or stipulation as to insurance recited above* (Rec., Vol. I, p. 35) ; and on a continuance of such failure for six months after demand in writing by the trustee for the performance of such covenant or stipulation, the trustee then and there had a right to take possession of the property. And in fact the Trustee did make demand, and more than six months later did attempt so to take possession at the beginning of the foreclosure suit by and through a receivership, which was denied it because of the opposition of the appellant and the defendant Kann, and because of their filing a bond authorizing the payment of insurance out of the *Penn Plate Glass Company's* policies if the Court should adjudicate that there was any obligation on the part of that company to insure. Consequently there exists a clear case in equity entitling the complainant to collect the amount of the loss under the mortgage out of the proceeds of those policies.

The evidence sustains all the allegations of fact necessary to the above contentions.

The original mortgagor, the Pennsylvania Plate Glass Company, never questioned its obligation under the mortgage to keep the mortgaged prem-

ises insured. Indeed, from the very beginning of the trust, it placed and kept alive insurance for the benefit of the bondholders. The same obligation was recognized and the same course pursued by the State Court's Receiver Stoner, whom Kann's course as a creditor, as we shall subsequently show, forced the directors to have appointed.

The Pennsylvania Plate Glass Company continued in possession of the property until March 19th, 1894, when Stoner was appointed Receiver in the proceedings for the dissolution of the company, begun by the directors Semmer and others in the Westmoreland County Court (Rec., Vol. II, pp. 67, 87). Stoner had been stockholder, director, secretary and treasurer of the Company (Rec., Vol. II, p. 65), since 1893, the second year of its existence. The mortgage, it will be remembered, was made in January, 1891. Stoner was acting in these several capacities, with the exception only of treasurer, in December, 1893, and in the early part of 1894, when Kann became treasurer, and the Receivership commenced (Rec., Vol. II, pp. 66, 70, 75).

As an officer of the mortgagor company Stoner was familiar with its business and knew the condition of the insurance which he had obtained on its plant (Rec., Vol. II, p. 66). He also knew all about the mortgage of January 1st, 1891. He knew that the company had procured insurance *for the benefit of the trustee*, and that when he became Receiver in March, 1894, there was about $200,000 of such insurance outstanding (Rec., Vol. II, pp. 66, 67, 71). This insurance had three, six and nine months to run, and some even a little longer (Rec., Vol. II, pp. 67, 71). Moreover, after he became Receiver, he himself as such took out insurance for the benefit of the mortgagee, under order of the Court, Receiver's certificates amounting to four or five thousand dollars being issued for the purpose of paying the premiums, so anxious

was the Court to preserve the insurance which the mortgage required (Rec., Vol. II, pp. 67,71). The insurance so taken out by Stoner ran for six months, more or less. In all these policies, both those taken out before and those taken out after the Receiver's appointment, the loss was made first payable to the mortgage trustee for the benefit of the bondholders (Rec., Vol. II, p. 73).

Kann,—the creditor who had forced the company into the receivership,—made no opposition to any of this, and we can imagine the treatment which he would have met with from the Westmoreland Court if he had opposed its insurance orders on the ground that the bondholders were not entitled under the mortgage to the benefit of insurance placed by the Mortgagor Company. The Court was protecting the property and was not concerning itself with any quibbles of that nature. These policies were outstanding at the date of the Receiver's sale, in June, 1894, when the property was sold to Kann, subject to the mortgage, the latter taking a deed July 2d, 1894 (Rec., Vol. II, p. 71).

Now, what became of these policies? They were never assigned to anybody. They were never renewed. *They were simply allowed to expire* (Rec. Vol. II, pp. 71, 73, 74). As for the actual policies themselves, the witness Stoner, though never yet discharged as Receiver, is ignorant of their whereabouts, and, though requested by us to produce them, is unable to do so (Rec., Vol. II, pp. 73, 127, 128). His memory as to the disposition of the policies is extremely hazy, as it is also when asked to give the amounts of the policies and the names of the companies that issued them. At first, in testifying, he stated that the policies were stored in a vault in Kann's office (Rec., Vol. II, p. 74). But the next day he stated that they were among certain papers left at Irwin "that weren't considered of any special value," and that were destroyed by the fire (Rec., Vol. II, pp. 127, 128).

The appellant's counsel, on page 29 of their brief, endeavoring to show that Judge Buffington was wrong in his opinion that these policies were turned over to Kann, who knew all about them, quote a few lines of this witness' contradictory testimony as to the delivery of these policies to Kann. But if his entire testimony be read, the Court will receive the same impression which Judge Buffington received and embodied in his opinion in the passage quoted by the appellant's counsel (Brief, p. 28). But it is of no importance whether Stoner *delivered* these old policies to Kann or not. The fact is undisputed that Kann knew of them, knew all about them, and deliberately and confessedly allowed them to lapse.

The above being the attitude taken towards the insurance which the mortgagor company, acting under its covenant, and its Receiver, acting likewise under the covenant as enforced by the Westmoreland County Court, had taken out to protect the mortgagee, the records of the Westmoreland County case show that upwards of $330,000 of insurance, procured through the agents, Ringwalt & Agnew and Zahn, was thus wilfully allowed to lapse (Rec., Vol. II, pp. 128–9). Yet this man, Stoner, officer and Receiver of the Mortgagor Company, and the defendant Kann, knew both before and after the beginning of the Receivership, even at that early day, in 1893–1894, long before the foreclosure suit was begun—indeed long before any default in the payment of coupons—*that the Trust Company was standing on the covenant in the mortgage, and was insisting on the keeping up of the insurance for the benefit of the mortgage* (Rec., Vol. II, p. 76). And Stoner says further that it was *because* of this insistence of the Trustee that the Pennsylvania Company did keep up the insurance until it passed into the Receiver's hands, and the Receiver himself pursued the same course (Rec., Vol. II, pp. 77, 130).

When asked if the Trustee's insistence had not led to the application, Mr. Stoner replied :

"Yes; and my own belief and knowledge that the property deserved protection for the benefit of creditors—— * * * and among other creditors * * * the mortgagee." (Rec., Vol. II, p. 130; and Record of Westmoreland County case offered in evidence by us at Record, Vol. II, p. 130).

Now, when the defendant W. L. Kann took possession of the property subject to the mortgage in July, 1894, *he knew all about the insurance.* Stoner had notified him (Rec., Vol. II., p. 74). Kann, it will be remembered, had become stockholder, director and treasurer of the mortgagor company in December, 1893, and January, 1894 (Rec. Vol. II, p. 57; Rec., Vol. I, pp. 480, 481). He had also become a very large creditor of the Company, under circumstances of a peculiar nature; and, indeed, it was Kann, who by his threats and proceedings against the Company, drove it into the hands of a receiver, and deprived it of the power of continuing to carry out the insurance covenant, as will be more specifically pointed out in the next point of our brief. The receiver considered his own active duties at an end when he had sold the property and deeded it to Kann. So that, soon after July 2d, 1894, when the mortgagor company's policies and the policies of the receiver for the mortgagee's benefit, had expired by their terms, *there ceased to be any insurance for the protection of the mortgage, and the insurance covenant was violated by the mortgagor company once and for all.* That violation still continues. Never since then has a dollar of insurance been taken out by the mortgagor company or the receiver, although, as we shall soon point out, the Trustee continued its former insistence upon the fulfilment of the covenant, and served *written notice* of that insistence on the *mortgagor company and the receiver*, as well as on Kann himself, the real party in interest, and on the appellant, the Penn Plate Glass Company.

Kann, once in possession, immediately took the ground that he would not insure for the benefit of the Trustee. He held the property personally for a year, from July 2, 1894, to July 1, 1895. As admitted in the answer to the supplemental bill, both he and his new Penn Company, organized by him, refused to insure for the benefit of the bondholders although requested so to do by the Trustee.

"They admit that long before the original bill was filed in the case, they gave distinct, repeated and written notices to the said plaintiff that they were not bound to insure the said premises for the benefit of the plaintiff, and that they would not nor would either of them insure the said premises for the benefit of the plaintiff as trustee, and of the bondholders secured by the said mortgage * * *, and they admit that they did not preserve existing insurance or effect new insurances for the benefit of the bondholders secured by the said mortgage" (Answer, Rec., Vol. II, p. 42).

And this admission is coupled with the further admission that both Kann and the Penn Company had full, actual and complete notice at the time of taking the property respectively of all the provisions, covenants and stipulations of the mortgage including those relating to insurance.

The appellant's counsel, pursuing some theory of their own about the grounds of our claim, insist here and there in their brief, as, for instance, on page 30, that the trustee knew of Kann's action in the premises, as if we took an opposite position. On the contrary, the very gist of our claim is that we did know of his action, and protested against it everlastingly, and reiterated the demands required by the mortgage. The appellant's counsel have wholly misapprehended our position, and there is not one word in their brief controverting the argument contained in this point of our brief.

*With the defaults above outlined in the performance of the insurance covenant of the mortgage in*

*existence on the part of the mortgagor company, the Receiver, W. L. Kann, and the Penn Plate Glass Company, the Trustee demanded in writing the performance of that covenant by all the above parties and thus availed itself of the right to "require the same to be done," expressly reserved to it in the mortgage.*

That demand was made by written notice dated November 29th, 1895, served by the Farmers' Loan and Trust Company, on Joseph W. Stoner, Receiver of the Pennsylvania Plate Glass Company (Plff's. Sup., Ex. No. 1); on Philip Semmer, President of the Pennsylvania Plate Glass Company (*ib.*, No. 2); on W. L. Kann (*ib.*, No. 3); and on W. L. Kann, President of the Penn Plate Glass Company (*ib.*, No. 4, Rec., Vol. II, pp. 131, 132).

Now, this being the state of affairs, and the parties above named persisting, in spite of the written demand, in violating the insurance covenant, and default in the payment of coupons having occurred, the Trust Company declared the principal of the bonds to be due, and filed its original bill to foreclose the mortgage. This bill was filed on the 8th day of July, 1896, *at which time more than six months had elapsed since the serving of the written demands for insurance as above stated at the end of November, 1895.*

Immediately upon the filing of the bill,—which prayed, among other things, that

"your orator may be placed in possession of the mortgaged premises personally, or that a Receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the said defendant the Pennsylvania Plate Glass Company, with power and authority to operate said plate glass works and carry out the business of said mortgagor company under the protection of this Court, with all the usual powers and duties of Receivers in such cases"

—the complainant made a motion for a Receiver, filing with the Court as part of the motion papers the written demands for insurance already referred to. *The defendants Kann and the Penn Company, being identical in interest were present by their attorney—the same attorney.* The motion was strenuously opposed by him on behalf of his clients, appearing in his double capacity ; and by reason of this opposition the motion was denied by the Court (Rec., Vol. II, p. 92) on the ground that the Penn Company was solvent and able to take care of the property.

And just here we may be allowed to reflect upon the consequences that have flowed from this opposition of the appellant and the defendant, Kann, and the resulting denial of the receivership. But for that action, the present situation would never have arisen. The duty of a Receiver appointed in this cause to insure for the benefit of the bondholders would have been even more imperative than was the duty of the Receiver Stoner to do the same thing. And we have already pointed out how carefully the Westmoreland Court guarded the mortgagee's interests. Here was an overdue mortgage in default to the amount of over $260,000, principal and interest matured. We were entitled to a Receiver to take the property into his hands, and it was the duty of the Court so to take charge of the property and to protect it by insurance and in every other way, for the benefit of whom it might concern. With great respect we state the situation plainly. Even had the Court appointed a Receiver and directed the taking out of full insurance, no more insurance could have been effected than the aggregate amounts of the existing $450,000, and the proof of this is that the appellant, if successful, will actually have collected out of the insurance, *not simply the value of its equity in the lost property, but the total value of the destroyed property.*

The duty of a Court to protect the subject-matter of a mortgage by insurance is too plain for argument, and the protection of the property is the primary object of a Receivership.

In *Wallace* vs. *Loomis* (97 U. S., 146), it was said that the power of a Court of equity to appoint managing Receivers of corporate property is "a part of that jurisdiction, always exercised by the Court, *by which it is its duty* to protect and preserve the trust funds in its hands." And this language was repeated in *Quincy, etc., R. R. Co.* vs. *Humphreys*, 145 U. S., at p. 104.

Now let us clearly understand the situation. The Trustee moved for a Receiver to insure and preserve the property. The Court erred in failing to grant the motion. *The Trustee's motion for a Receiver was equivalent to an attempt to take possession.*

In *American Bridge Co.* vs. *Heidelbach* (94 U. S., 798) the Court said:

"The mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a Receiver appointed, and possession delivered to him."

In *Allen et al.* vs. *Dallas & Wichita R. R. Co.* (3 Woods, 316), a railroad mortgage gave the trustees the right to enter upon and take possession of the railroad company's property and operate it in default of the payment of interest. A default having been made, the trustees filed their bill for foreclosure, instead of entering upon the property, and asked for the appointment of a Receiver. It was held that such default was a sufficient ground for the appointment of a Receiver upon the application of the Trustees, and that the Trustees were entitled to a receivership. The Court said:

"It remains to consider whether there was any necessity for the appointment of a Receiver, and

whether, under all the circumstances as they now appear, a Receiver should have been appointed.

"In my judgment, independent of any necessity for the appointment of a Receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to have a Receiver appointed to take possession of the trust property.

"The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage upon its property, are not to be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee.

"In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal and interest of the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, *pro rata*, of the principal and interest due on the bonds. In short, it was made the duty of the trustees in the contingency named, to exercise the rights and perform the duties of Receivers appointed by the Court.

"These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. *They constituted a part of the consideration which the railroad company offered to purchasers of its bonds.*

*State of Maryland* vs. *The Northern Central R. W. Co.*, 18 Md., 193.
*Dunville* vs. *Ashbrook*, 3 Russ., 99 (3 Eng. Chy. Note C).

"A mere default in the payment of the debt is no ground for the appointment of a Receiver, but

this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents.

*Whitehead* vs. *Wooten*, 43 Miss., 523.
*Morrison* vs. *Buckner*, Hempst., 442.

"Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right and it was their duty to do, have applied to this Court to assist them in the execution of the trust whose duties they have assumed?

"These trustees might, as is sometimes done, have first taken possession of the trust property under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the Court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, *and it is the clear duty of the Court to give them all the rights conferred by the deed of trust.*

"By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession, the bondholders are in danger of losing their right to the income and profits.

*American Bridge Co.* vs. *Heidelbach*,
94 U. S., 798.

"It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagor is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute.
* * *

"Regarding, therefore, only the terms of the

trust deed, upon proof of a three months' default in the payment of the interest, and upon a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it would be the duty of the Court, without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured."

In the case at bar the mortgage covered the rents, issues and profits. Had the Court appointed a Receiver, as prayed by the Trustee, those rents, issues and profits would have been collected by him and applied in part to the payment of insurance premiums. As it is, by the failure to appoint a Receiver all the dangers alluded to in the above opinion have befallen the present unfortunate bondholders, and the failure of the Court to appoint the Receiver *was due entirely to the action of the appellant and its organizer, Kann.*

Mr. Ferguson, put on the stand after Mr. Schoyer had been called by us and had refused to testify (Rec., Vol. II, pp. 90-91), described the events as follows:

"According to my recollection, I received notice from Judge Buffington that he had concluded to deny the appointment of a Receiver. According to my recollection it was the following day. I went into Court, *Mr. Schoyer* was there and *Mr. Kann* was there, and I said to the Court that in considering the motion for a Receiver, it occurred to me that the Court had not considered the fact that this property was without insurance; that there was danger of fire; that my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage, and under the circumstances Judge Buffington said: 'I can't decide that question,' and intimated

to them that if they were bound to insure they ought to protect us, and they denied they were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimier was given to us in pursuance of my demand for insurance, and filed in Court, and is on file to-day" (Record, Vol. II, pp. 92-93).

By this bond, it was agreed by the defendant Kann and by Mr. Wertheimer that if any obligation should be shown to exist on the part of *the Penn Company* to insure for the benefit of the mortgagee, the insurance taken out by *the Penn Company* should be applied to the payment thereof. The bond is set forth in full on pp. 43-44 of the appellant's brief. A good deal is said in that brief about the proceedings at the time of our motion for a receiver and the meaning and effect of the above bond, with a view to showing that Judge Buffington was wrong in his opinion as to the facts. We will here append a short discussion of appellant's criticisms in this regard. And, first, we will call the Court's attention to the fact that this appeal is from the *decree* and not from the *opinion*. There are no "*findings*" and no *conclusions* except such as are contained in the decree. The adjudicating passages in the decree—which was settled by the attorneys for both sides before the Court—relative to the insurance branch of the case are contained on pages 197-198 of the Record, Volume II. If the adjudications contained in those passages can be sustained on the evidence and the law, the appeal must be dismissed, without regard to whether this Court concurs in the arguments included in the opinion of the lower Court or not.

We consider that Judge Buffington's opinion can be sustained in every particular; but should this Court differ from him on any point, we desire to say that we come here on the entire record. The appellant's counsel, in referring to passages of the opinion, as "findings," and conclusions, as they do repeatedly (Brief pp. 25-26, 28, 31-2, 35, 45, etc.),

and then seeking to show that these findings and conclusions were error, are departing from the course which they should pursue in order to sustain their appeal. They must show to this Court that upon the evidence and under the law the *decree* which we have obtained cannot be upheld.

We refer to the above practice of our opponents because they have undertaken to set up in their brief as the theory upon which our case is based a proposition which is not only not our proposition at all, but never was advanced by any one until the appellant's counsel created it here in order to overturn it and thus to produce the impression that they were overturning our contention. Pages 23 to 51 of their brief are given up entirely to an attempt to controvert the following proposition which they claim to be ours : that the Penn Plate Glass Company agreed by the bond given at the time of our motion for a receiver to place insurance on the mortgaged premises for the benefit of the trustee ; that it subsequently, secretly and without the knowledge of the Court or the trustee, departed from this agreement, misled the trustee, and placed insurance for its own benefit alone ; that, therefore, upon the destruction of the property, an equitable right against the Penn Company's policies sprang into existence in favor of the trustee. The pages of the appellants' brief above mentioned show that the whole effort of counsel was directed to proving the above proposition to be the basis of the decree, and to demonstrating its fallacy. Yet, it is absolutely certain that no such proposition ever entered our minds ; that the case was neither tried nor argued on any such proposition, and that Judge Buffington never wrote his opinion with any such intendment. While it is true that Judge Buffington does refer to the fact that a large part of the Penn Plate Glass Company's policies were taken out after the motion for a receiver was made, he does so only in the course of arguing and as one of the many facts

in the case from which the complainant's equity has arisen. If that fact were entirely absent from the case it would not affect our right to succeed, nor the grounds of our argument or of that of Judge Buffington. The principles upon which we have always rested this case are those to be found in this brief, and we ourselves have had no trouble in understanding the very clear logic of Judge Buffington. It is therefore more difficult for us to perceive how the misapprehension on the part of appellant's counsel could have arisen.

On this subject we have now only to add a few remarks as to certain conclusions in this part of the appellant's brief which are not borne out by the evidence.

We have already pointed out that far from contending that the trustee was ignorant of Kann's attitude in the matter of insurance, it constantly, and from the beginning, protested against that attitude and insisted upon his carrying out the covenants of the mortgage. The reflections of counsel seeking to prove knowledge on the part of the trustee are therefore a work of supererogation. We admit that we had knowledge, and we say that we acted upon it. But when counsel go further and undertake to state that the trustee knew before the fire what the character of the Penn Plate Glass Company's policies was, or, indeed, whether that company had any policies or not, they state something which is not in the record, and we may therefore be permitted to contradict this and to say that the trustee had no such knowledge. As for the meaning of the word "existing" contained in the bond given at the time of our motion for a Receiver, that is entirely immaterial to our case. We are not concerned with whether it meant policies existing at that time, or policies existing at the time when a fire should occur. The latter would be the natural and obvious construction of the phrase and hence we cannot agree with

the appellant's counsel when they adopt the opposite construction and seek to draw inferences from it. But the matter is quite outside the issue, as is also the question whether the policies of the appellant were taken out before or after the motion for a Receiver. When the Court shall have completed its reading of our brief, it will perceive that the time when those policies were taken out is immaterial to our contention. What we claim is that under the circumstances of this case *any* insurance covering the property and belonging to the Penn Company is affected with an equitable lien in favor of the trustee. But even if the time of the taking out of the Penn Company's policies were material, the appellant would find it impossible to point to any evidence in the case showing that Judge Buffington was wrong in his statement that a large part of the Penn Company's insurance was placed after the motion for a Receiver had been made. In any event the trustee's demands for insurance antedated the motion for a Receiver, the organization of the Penn Company and the purchase of the property by it. Those demands continued throughout all the transactions, and no insurance was ever effected by the Penn Company until long after it had been repeatedly requested by the trustee to insure for its benefit, and had refused to do so.

One other point of the appellant's counsel on this head requires attention. They say that the bond given at the time of the motion for a Receiver was a personal obligation of Kann and Wertheimer and in no sense a promise by the appellant, arguing as if this suit were based in some way upon the obligation in question, which it certainly is not. But the effect of the giving of the bond is entirely different from what they apprehend. The bond was given in order to enable the *appellant* to remain in possession of the property. Its effect was to induce the Judge to deny our motion for a receivership, to which we had a right, and to keep the trustee out of pos-

session. It was given in open Court, under agreement entered into by the attorney for the *appellant*, appearing as such (who was also attorney for Kann), with the *appellant* present by its President, Kann, as well as by its attorney. It is conditioned upon the adjudication of our claim against the *appellant*, and requires the obligors to pay out the amount of the bond, in case of an adverse decision, from *insurance belonging to the appellant.* It was nothing if not an undertaking given on behalf of and under the direction of the *appellant*, and whatever consequences flow from the giving of that bond have arisen by virtue of an act of the *appellant* itself.

Coming back now to the thread of our argument, we have shown above (1) a covenant or stipulation in the mortgage and by the mortgagor company to insure; (2), a provision in the mortgage that upon a breach of this covenant by the mortgagor and the continuance of that breach for six months after demand by the trustee for the performance of the covenant, the trustee could seize the property or foreclose the mortgage; (3), a breach of the covenant by the mortgagor; (4), a written demand by the trustee for the performance of the covenant; (5), a continuance of the breach for six months after that demand; (6), a similar demand addressed to the defendant Kann and the appellant, who had bought the property subject to the mortgage for a nominal sum, and had been instrumental in producing the insolvency of the mortgagor company; (7), the bringing of a foreclosure suit by the Trust Company, praying to be put in possession personally, or through a Receiver; (8), an attempt by the trustee to take possession through a Receiver, based in large part upon the necessity for insurance; (9), the frustration of that attempt by the appellant, a purchaser subject to the mortgage under peculiar circumstances and for a nominal

consideration; (10), an agreement, given on behalf of the appellant in order *to prevent such possession*, undertaking to pay any obligation to insure for the benefit of the mortgagee which might be declared to exist out of the *appellant's* own insurance; (11), a subsequent destruction of the property by fire, while the trustee was being kept out of possession and was being obstructed in obtaining a decree of foreclosure and sale through defenses by *the appellant*, which defenses it has now abandoned as untenable.

Surely we have made out a clear right to have the Penn Plate Glass Company's insurance moneys *substituted* for the lost security of the mortgage.

This claim of ours does not in any sense rest upon a theory of *personal* or *individual* liability to pay the bonds or to perform the covenants on the part of the mortgagor company, or any one else; nor yet upon any theory of covenants running with the land. Counsel's argument on those points, whatever its merits or demerits, has no application to the present controversy. The above claim rests on the right accorded to the trustee by the mortgage to *foreclose or take possession* in case of a breach of the covenant by the mortgagor, who *has* broken it. It rests on the right of the trustee to enforce the *lien* of the mortgage for such a breach of the covenant; and our contention is that under the circumstances outlined above, the property having been destroyed, the *lien* of the mortgage *is* capable of enforcement and must be impressed on the insurance fund, substituted for the lost property.

## III.

### The History of the Destruction of the old Company and the Organization of the new, discloses Circumstances which make it inequitable for the Appellant to receive the Insurance as against the Mortgagee.

We come now to another view of the case under the supplemental bill. There is, in fact, an identity of interest in the parties with whom we are dealing which equity will recognize. The old Pennsylvania Plate Glass Company was apparently a solvent concern, fulfilling its duties under the mortgage, until in an evil hour its officers met the defendant William L. Kann. He discerned a field for his peculiar operations, and became a stockholder, director and treasurer. Worse than all he became a creditor, and was thus enabled to wreck the company and to become himself the owner of its property. As such ownership might expose him to criticism if the covenants of the mortgage were not fulfilled, he proceeded to organize the Penn Plate Glass Company, and to hold the property, not in his individual name, but in the name of that organization. But no Court of equity can fail to see the true situation. It is Kann and no one else who is fighting for this insurance money to-day, whether he appears in the name of the defaulting corporation or in his own name.

Opposing counsel have a good deal to say as to whether the covenants *run with the land* or not. But our contention does not rest upon any theory of that kind.

There is, indeed, no iron rule with reference to covenants running or not running with the land. While generally a covenant to insure is a mere personal covenant, circumstances might exist to make it run with the land. And there are

many authorities which distinctly hold that covenants to insure do run with the land, as much as covenants to repair or to rebuild, or for another term:

*In re Sands' Ale Brewing Co.*, 3 Bissell, 175.
*Vernon* vs. *Smith*, 5 Barn. & Ald., 13.
*1 Washburn on Real Property*, 426.

But in this case, whatever would have been the effect of such a covenant if *strangers* not cognizant of the facts had purchased the property at the Receiver's sale, we assert that under the existing circumstances, Kann and the appellant, for the purposes of equity, and whether the covenant runs with the land or not, stand in the place and stead of the Mortgagor Company itself, and must be held bound by the covenant to insure, not perhaps to the extent of being obliged to respond in a court of law, but surely in a court of equity which has these insurance funds in its hands. A large part of the appellant's brief is taken up with argument to show that covenants to insure do not run with the land. Yet the Court below distinctly stated in his opinion that he did not rest his decision on the doctrine that such covenants run with the land (Rec. Vol. II, p. 177).

We have already shown that the old company and its Receiver recognized and fulfilled the obligation to insure the property, and that when Kann bought in June, 1894, insurance existed to his knowledge for a large amount in favor of the trustee, which he allowed to lapse.

But even before that date, and in 1893, Kann had become associated with the Pennsylvania Company, the original Mortgagor Company, under circumstances, which, to say the least, were very peculiar.

We call the Court's especial attention to Kann's own testimony before he knew how it might be

used against him. He was called by the defendants under the original bill *before the fire occurred*, and he gave the following testimony about his connection with the original company. He was first approached, he says, in the early part of 1893 by Mr. Semmer, who was largely interested in the company (Rec., Vol. I, p. 480). He then had made no loans to the company (*Ib.*). But in December of that year he became its creditor by lending it money, and, in fact, discounting for it a note of $3,500 (*Ib.*, pp. 471–9). Prior to the making of this loan, as he testifies, he was handed a statement by the officers of the company purporting to show their financial condition (*Ib.*, p. 471). This statement (Ex. No. 21), together with other statements made by the officers at about the same time, purporting to show that the company was in a flourishing condition and was making money notwithstanding a prolonged strike, and notwithstanding the additional fact that the panic of 1893 was affecting all business, was what induced Mr. Kann, as he testifies, to advance money in November, 1893, and to "become interested in the company" (*Ib.*, p. 472). On the strength of that statement he declares he "became interested in the company" (*Ib.*, p. 473), "*agreeing to identify*" himself with it (*Ib.*, p. 480), and was elected an officer (*Ib*, p. 473), director and treasurer of the Company. "I accepted the position," he says, "predicated on that statement in open meeting that if that statement was true, and they could substantiate it, that I would accept the position which they had elected me to—as treasurer of the Company, and if, upon examination of their books, which I asked ten days' time to do, if the examination proved that that was true, I would accept it" (*Ib.*, p. 473).

The election took place January 10th, 1894, and, as he testifies, he accepted the position with the understanding above set forth (*Ib.*, p. 481). Two days from his election, on January 12th, 1894, he

went to Irwin, where the works were, and proceeded to investigate the books of the Company, with every opportunity given him to examine them (*Ib.*, p. 481). *He found that the Company was not solvent*, on the contrary that it was, and always had been, insolvent. He says, "*At that time* I had evidence that they had always been so from the inception of their business" (*Ib.*, p. 477). The deficiency according to him amounted to upwards of $119,000 (*Ib.*, p. 477). Immediately, on the same day, January 12th, he tendered his resignation, as he says (*Ib.*, p. 481). The Executive Committee was called at his instance on that day (*Ib.*), but somehow he didn't get his resignation accepted, and was still holding over as treasurer of the Company on March 15th, 1894 (*Ib.*, p. 482)!

It may perhaps be considered surprising that this man who had been so uneasy about becoming connected with the company, which he now knew to be absolutely insolvent, should have continued to hold over as treasurer after his discovery of the insolvency, from January 12th until March 15th—two entire months. It must be remembered that at that time his loans to the company were quite small, a few thousand dollars at the most; and if he is to be believed, his holding of the company's stock consisted of a single share, transferred to him by Cowen or Semmer, for which he never paid (*Ib.*, p. 480). So that he could have had no *personal* reason for holding over, no necessity to stay there for *the protection of his own interests*. Of these circumstances he makes two explanations, widely different from each other, and both very odd, to say the least. The first is that he held over under protest, because the officers of the company claimed "that they had then an offer to sell out one-third of the controlling interest in that plant for a very large sum of money, and they pressed me to take no arbitrary steps un-

til they could consummate that, when they would relieve me of the position and pay me back the money which I had advanced" (*Ib.*, p. 473). This explanation throws an interesting light on his ideas as to business propriety. According to the above statement, which is in his own words, knowing that this company was hopelessly insolvent, and had been so from the beginning, he was nevertheless willing to aid those interested in it in foisting one-third of the controlling interest in the plant on *somebody* "for a large sum of money." To assure the success of this nefarious scheme, he wants us to understand that he was willing to remain treasurer of the insolvent corporation for a while.

The fact that Kann voluntarily offers this explanation is of itself sufficient to exhibit a most singular dulness of the moral sense on the part of the witness, and to show us what kind of a man we are dealing with. But his other explanation is so weak that we are led to realize the trouble he was in to explain his strange connection with a company which he claimed to be insolvent. And perhaps we may be able later on to point out who the *somebody* was with whom the negotiations were pending. Meanwhile, we will have to be content with this explanation of his holding over, unless, indeed, we adopt the second, which is to the effect that the directors were having great difficulty in getting a meeting because they were in such straits "that you couldn't get them together" (*Ib.*, pp. 481, 482)!

Be these matters as they may, Kann, by his own testimony, remained treasurer of the company two months after he knew that it was and always had been insolvent. Now, did he, as one would naturally suppose, *cease* lending money to this insolvent concern from which he was so eager to get loose, and in which he had so little capital invested? Not at all. He actually proceeded to advance them "further moneys in January and

February, 1894" (*Ib.*, p. 471), and lent them altogether "$42,500 between December and February" (*Ib.*, p. 479). This was certainly very extraordinary and would, indeed, seem foolhardy but for the fact that Mr. Kann, being apparently a very shrewd business man, who saw far ahead, was careful to take security for his loans. With the exception of the discount of the $3,500 note, with which he had opened his account with the company, the $42,500 loaned by him, was, as he testifies, "in cash, on their promise to deliver to me, and they did deliver to me, judgment notes of the company" (*Ib.*, p. 480).

But, somehow or other, the company, although insolvent, seems to have held its own, and we do not find that any other creditors were pressing it for payment. So Kann had to resort to severe measures himself. There didn't seem to be any prospect of a Receivership unless he began proceedings to collect his indebtedness. He had only lately come into the company. He had discovered, he says, that it was insolvent; nevertheless, he loaned it money, and now he enforces his judgment note and puts it in such straits that the appointment of a receiver becomes necessary. The company was evidently at his mercy, so its directors authorized the commencement of a suit to wind up its affairs. In this suit in the Westmoreland County Court the company went into the hands of Joseph W. Stoner, as Receiver, in March, 1894 (*Ib.*, p. 473). In June, 1894, the Receiver, by the order of the Court, sold the property subject to the mortgage, and Kann realized the opportunity for which he had been working. He bought in the property subject to the existing mortgage of $250,000 for $37,500, bidding it up against other bidders, and outbidding the highest bidder by $500, thus showing that he was very desirous of getting the property. He had at this time reduced his claims against the company largely to judgments. He thinks he

had a judgment for the whole amount, but as to the actual amount of the judgment he is not quite sure (*Ib.*, p. 482).

It was pretty quick work. In December Kann made his first advance of $3,500. In January he discovered the insolvency, but nevertheless advanced more. In February he enforced his securities. In March the Receiver was appointed and in June Kann was the owner of the property. Whatever we may think of him, his promptness and efficiency cannot be criticised.

The above was the condition of Kann's testimony, as it appears on the record, at the time of the filing of the supplemental bill. It will be seen that he corroborates in this testimony many of the allegations of that bill as to his connection with the mortgagor company. He himself remembers in the clearest manner that the original mortgagor company was insolvent when he first became connected with it; that he found this out almost immediately afterwards, but, nevertheless, proceeded to lend it large sums of money, reducing his claims hastily to judgments, and continuing to hold over as treasurer until a Receiver was appointed, from whom he bought the property, subject to the mortgage, for a very inadequate consideration. With the exception of Marthens, the expert, who corroborated the proof of the company's insolvency, he was the last witness called by the defense under the original bill. He had heard all the testimony of Semmer and the others, and it was to be supposed at that time that his would be the last word in the case concerning these his transactions with the original company.

But things were destined to be otherwise. The fire happened and the supplemental bill was filed. Semmer was recalled by the complainants and closely examined by them as to these very transactions. A great deal of new light was thrown upon them, but by no means in contradiction of Kann,

who had proved a very effective witness against himself. We will now epitomize Semmer's testimony just as we have done Kann's.

Semmer showed that he had personally been connected with the mortgagor company in various capacities from the beginning, and was president in 1893 and 1894. He first became acquainted with Kann in the fall of 1893, and in the beginning of 1894 Kann was elected director and treasurer (Rec., Vol. II, p. 57). This election was held on January 10th, 1894 (Rec. Vol. II, p. 59). Before Kann became director and treasurer, Semmer says, there was an agreement entered into between Kann and some of the stockholders—a verbal agreement. These stockholders were represented by Semmer and Cowen. Semmer practically handled the entire negotiations (Rec. Vol. II, pp. 57, 58), which were held in the latter part of 1893 at New York, Irwin and Pittsburgh (*Ib.*, p. 58). These stockholders, it seems, were very hard pressed for money. The panic was on, and they were looking for somebody to provide additional funds. Kann appeared with an evident desire to go into the Plate Glass business (*Ib.*, p. 58), and they finally entered into an agreement with him to give him one-third of the controlling stock provided he would furnish the company with the needed money—$100,000 was needed, certainly—and he agreed to furnish this money provided that Semmer and Cowen would assign to him one-third of their joint holdings of the controlling stock interest (*Ib.*, p. 58). With this testimony before us we begin to find out who the *somebody* was who, as Kann had testified, was negotiating for one-third of the controlling interest, and *because of whose negotiations he, Kann, consented to continue treasurer of the company, although he knew it was insolvent.*

Carrying out the agreement, Cowen and Semmer transferred to Kann one-third of the controlling interest, amounting to $86,000 in stock (*Ib.*, p.

58), and the actual stubs of the certificates so transferred and the record of the transfers on January 19th, 1894, may be seen in the exhibits offered by us on pages 96 and 97 of the Record, Vol. II. It is interesting to compare this proof with Kann's own statement already recited that he never had but *one* share in this corporation. Kann also acted in pursuance of the agreement between himself and Cowen and Semmer. He accepted "the directorship and financial management" at the annual election (Rec. Vol. II, p. 59) in January, 1894, and advanced some $38,500 in the first six weeks of his connection (*Ib.*, p. 59). *None of this was advanced before he was elected* (*Ib*). This is in strict accord with Kann's own testimony already quoted, and it will be recalled that within two days after his election, and consequently before he made these advances, as he admitted, he knew the company was insolvent.

Now, these amounts were advanced by Kann on the understanding that he was to endorse with Semmer the company's notes, receiving by way of protection judgment notes from the company. He obtained *an option from the company on the unsold preferred stock*, amounting to about $106,000, and the understanding was that, when he had paid for this stock, the proceeds of such sale should be used to pay the notes as endorsed (*Ib.*, pp. 59 and 60). Under this arrangement a judgment note for $10,000 was issued to Kann, but judgment notes were refused him as to the balance of the $38,500, because, after advancing that much, *he declined to advance any more, unless Cowen and Semmer would assign to him the balance of their stock* (*Ib.*, p. 60). Thus, Kann was gradually seeking to get absolute control of the company. A treasurer and director, with one-third of the controlling interest in the stock in hand, with an option on $106,000 preferred stock, with a judgment note for $10,000, and other claims amounting to $36,500, and with the company insolvent and in dire need of

money, he expected to be able to force these parties to hand over to him the balance of the controlling stock. This extraordinary demand was made within three or four weeks after January 10th, 1894 (Rec. Vol. II, p. 60).

Upon the refusal of Cowen and Semmer to comply with this demand, Kann entered his $10,000 judgment note (*Ib*, p. 51). The sheriff took possession on March 14th, and the directors of the company hastened to call a meeting, when it was decided that the only thing to be done was to have a Receiver appointed. The application to the Westmoreland Court for a Receiver was accordingly made. This followed immediately the entry of Kann's $10,000 judgment note. The application would never have been made but for that. "Otherwise the company was in no immediate stress, excepting the pressure brought on by Mr. Kann," says Semmer (Rec. Vol. II, p. 62). After the Receiver was appointed, Kann brought suit for the balance of the $38,500 not represented by judgment notes, seeking to reach the remaining moneys in the hands of the Receiver. *He attached, moreover, $15,000 or $16,000 of the company's money in New York, its money in the hands of its selling agent, Hutkoff, and its money in the People's Bank* (*Ib*., pp. 62 and 63).

This testimony, with Kann's own testimony already quoted, forms the most complete proof of the allegations of the supplemental bill as to Kann's proceedings in connection with the mortgagor company, which resulted in the wrecking of that company, the depriving it of its property, the prevention of the fulfilment of its covenants and obligations and the transfer of its property to himself. That he laid his plans and proceeded with a view to obtaining control of the property in one way or another, is beyond question in view of the evidence. Failing to get possession by means of a controlling interest in the stock, he had recourse to other and more drastic measures which

but await the decision of this Court to be deservedly defeated.

Kann's counsel subjected Semmer to a vigorous cross-examination, but did not succeed in shaking his testimony. The cross-examination will be found on pages 97 to 127 of the Record, Volume II. On this cross-examination Mr. Semmer testified that his arrangement with Kann was a private matter, of which the mortgagor company had only partial notice. (Rec., Vol. II, pp. 97–101). Mr. Schoyer again referred to the statement (Ex. No. 21) already mentioned by Kann, whereby, as defendants allege, an actual loss of $119,000 was changed to an apparent profit of $25,000, and cross-examined Semmer with a view to showing that, as Kann had testified, this statement had been shown him by Semmer at the time he, Kann, became connected with the company (Rec., Vol. II, pp. 106–108). We may say in passing, that this much talked of statement was a very harmless affair after all, and that the theory upon which it was drawn was proved to be perfectly accurate by the witness Marthens (Rec., Vol. I, pp. 440–471). But whether such statement was presented or not, and whether it had the effect ascribed to it or not, the fact remains that after the 10th of January Kann had full access to the books and learned that the company was insolvent, and nevertheless continued to act as treasurer and director (from which offices he has never to this day been relieved) and to advance moneys in the sum of $38,500 (Rec., Vol. II, p. 108). Attempting to shake Semmer's testimony as to the actual transfer to Kann of one-third of the controlling interest in the stock, Mr. Schoyer only succeeded in clinching Semmer's testimony in chief, which the witness repeated again and again in answer to Mr. Schoyer's questions (Rec., Vol. II, pp. 110–112).

One thing brought out by the cross-examination was a proposition made by Kann after his original

agreement with Semmer and Cowen, at Mr. Schoyer's office, by which the control of the company was to be placed in the hands of Kann at once in consideration of further advances by him. Mr. Schoyer's understanding of that proposition is set forth in the form of a question on page 113 of the Record, Volume II. Semmer, however, testified that he flatly refused to accept that proposition because it was altogether one-sided—that by it Kann was to get every advantage and Semmer and Cowen practically nothing (Rec., Vol. II, pp. 114–115, 116, 117–118, 119). "Mr. Kann," says Semmer, "kept threatening to close us up unless we would assign him the entire controlling interest of the concern" (*Ib.* p. 115). "Our directors never held a meeting for the purpose of having a Receiver appointed until Mr. Kann had entered judgment" (*Ib.* p. 127).

Now, *after Kann had heard the above testimony and for the purpose of rebutting it, he himself was called by the respondents and gave more testimony.* His former testimony already summarized by us, will be remembered in connection with this. He reiterates his election as treasurer on January 10th, 1894, and his continuance in that office "under protest" until March, when the property passed into the Receiver's hands (Rec., Vol. II, p. 140); also the fact that he examined the books and learned of the company's insolvency within a few days after his election (*Ib.* p. 142). On page 143 he says: "The only arrangements I ever had to advance any money was after I became or took the position of treasurer." This, as we have seen, differs somewhat from the facts as testified to by Semmer, *and as testified to by Kann himself on his former examination*, when he showed that his advances had begun in December, 1893. But it is another strong announcement of the fact that the bulk of his advances were made *after* he became treasurer—that is, after he knew that the

company was insolvent He admits having received the $10,000 judgment note (Rec , Vol. II, p. 143). The amount of his advances is again fixed at $38,500, exclusive of the note for $3,500, which he had discounted before he became treasurer (*Ib.* p. 144). He then states the proceedings which resulted in his entering judgment against the company on March 15th, 1894, and the appointment of a Receiver on the 19th of that month (*Ib.* p. 144–145). He obtained judgment for the rest of his claim (*Ib.* p. 145), which was entered as of March 16th, 1894 (p. 145)—and was largely satisfied, as Stoner's testimony will show, out of property of the mortgagor company other than the mortgaged property—and he bid in the property at the Receiver's sale in June for $37,500 (p. 146). When asked by Mr. Schoyer about the statements of Semmer concerning the arrangement with Kann to advance $100,000, Kann was very careful in framing his denial of the truth of those statements. Read his denials (Rec., Vol. II, pp. 146–147), and it will be seen that he only denies that arrangements to advance moneys were made "*preliminarily*"—"*before he got a resolution of the executive board of the company to give him judgment notes*"—which was in early January, 1894. His denials at this point amounted to no more than a declaration that he had been smart enough to make no advances—no promises of advances—until he got a resolution of the company to give him *judgment* notes. What he was aiming at was the security. He says that he undertook to "accept their proposition" (that is, Semmer and Cowen's proposition), if his examination of the books showed that the Company was solvent (Rec., Vol. II, p. 146). He found that the Company was *not* solvent, nevertheless, apparently, he *did* accept their proposition, for he went ahead and advanced $38,500, getting a judgment note for $10,000 of the same. "They were hopelessly and totally insolvent," he

says on the 1st of January, 1894 (Rec., Vol. II, p. 147).

On pages 148 and 149 he offers an explanation of the transfer of stock to him from Semmer and Cowen, which, according to him, was effected under the arrangement at Mr. Schoyer's office in February, 1894—the one referred to by Semmer as utterly one-sided in favor of Kann and which Semmer says was declined altogether. The preceding arrangement Kann denies. He says the arrangement of February, 1894, fell through, and that, *while he holds the stock*, he holds it only as a portion of the company's records (Rec. Vol. II, p. 149). It was stock formerly belonging to Cowen and Semmer, transferred to Kann under one arrangement or another, and yet Kann says here that he holds it *for the company*. What has the *company* to do with it? The truth is, Kann is trying here to explain his *possession of this stock*, although, as he states, the arrangement fell through. It makes no difference to us whether the agreement between Kann and Semmer, by which Kann got this stock and advanced moneys, was made before or after he was elected treasurer—at Mr. Schoyer's office or out of it—the *fact* upon which we rely and which is proved by Semmer, by Kann and by all the evidence, is that Kann *did* contract in the beginning of 1894, when he knew the company was insolvent, and when he was becoming a large creditor of the company, to get a controlling interest in the stock, and to obtain judgment notes of the company. The Court will draw its own inferences from his first allegation that he never held but one share of stock, and his subsequent admission in view of the tell-tale stubs that he held one-third of the entire issue, and from other inconsistencies between his first and second explanations.

Of course, Mr. Kann was given an opportunity to deny specifically and *seriatim* the various charges brought against him in connection with his proceedings at this time, and, of course, he thor-

oughly whitewashed himself (Rec. Vol. II, 150–154). His denials will have to be taken for what they are worth, and in comparison with the rest of the evidence.

Cross examined as to why Semmer had refused to sign any more judgment notes after the first $10,000, Kann could only say that Semmer wouldn't sign—said he wouldn't (Rec. Vol. II, p. 155). Is this more probable than the clear explanation of his own refusal given by Semmer himself?

Cross-examined as to the issue of the certificates transferred to him by Cowen and Semmer, Kann showed that the stock books were at his own office; that the certificates were in the handwriting of his own bookkeeper (p. 156). The balance of the cross-examination will be found on pages 158–164 of the Record, Volume II, and we refer the Court to it *in extenso*.

We must also leave the Court to refer to the Record for the testimony of Stoner, corroborating some of the above facts surrounding Kann's acquisition of the property (Rec. Vol. II, pp. 68–89). We have already devoted too much space to the discussion of a phase of the case which the evidence leaves without a doubt—the relations of Kann to the old company. That he wrecked that company and obtained its property at a nominal price and in pursuance of a scheme laid out from the beginning, is proved as surely as anything ever was proved. We will now proceed to show that the Penn Company is merely another name for Kann.

If no other proof of this were in the case, it would be sufficient to point to the consideration named in the deed to the Penn Company—$83,500, consisting, as Kann himself testifies (Rec., Vol. I, p. 483), of "just exactly what it cost" him; * * * "that is" (he says) "the $37,500, six per cent. interest added on to the purchase-money up to the time, plus the improvements which I had made

and paid for, they assuming * * * the unpaid portion of those contracts not paid for yet on the improvements, less $10,000."

But there is abundant proof of the identity of the Penn Company with Kann, in his own testimony.

"*I subsequently formed a corporation* known as the Penn Plate Glass Company and sold them the property" (Kann's testimony, Rec. Vol. I, p. 471).

This company, it seems, he himself "organized" about a year after he had bought the property, and he "turned over" the property to it (Rec. Vol. I, pp. 482-3), and has "managed that plant ever since it has been operated, * * * since it has been a corporation." He is "now president and manager of that company" (Rec. Vol. I, pp. 478-9).

Mr. Stoner's testimony also proves the identity of Kann and the Penn Company. Kann divulged to him his intention of reorganizing the company about six months after he had bought it (Rec. Vol. II, p. 75). Kann was a charter member, and so were all his friends—Dreyfus, Rosenthal, Kerr, Wertheimer and Stoner (*Ib.*, p. 76), the latter of whom became a charter member at the solicitation of the others, and took ten shares of the stock (*Ib.*, pp. 75-76). He subsequently parted with them, but at a price which he refused to state (*Ib.*, p. 88).

Another proof of the identity of Kann with the Penn Company is the fact that he so vigorously defended this suit. Having parted with the property, and been paid, as he declares, all he disbursed upon it while in personal possession, there could be no good reason for him to join in defence of the Penn Company unless his interests in the latter were so great as practically to identify him with it. Moreover, he, together with Mr. Wertheimer, went upon the insurance bond filed in this case whereby he obligates *himself* to pay the insurance (if the Court so decides) out of the *Penn Company's Insurance*. Indeed, it is unnecessary to

continue calling attention to the numerous proofs of the Penn Company's identity with Kann, and we shall now simply assume that it has been proved by the whole course and conduct of this suit, and shall proceed to discuss, in conclusion a few principles of law which we think bear upon the relief prayed for in the Supplemental Bill.

The principle that equity will look upon that as done which ought to be done applies perhaps more strongly in this case than in any other that has ever yet come under our attention, and we contend that there is an irrebuttable presumption that the insurance which has been effected by the Penn Plate Glass Company extends to and covers the interests of the trustee.

"It is a fundamental principle that equity imputes an intention to fulfill an obligation. The meaning of this is that when one acquires an interest in property and is under some obligation in respect thereto to another, though in acquiring the same he expressed no intention of fulfilling the obligation, equity will impute such an intention and will erect an equitable estate or interest in the subject-matter in favor of the person to whom the obligation is owing."

Beach on Modern Eq. Juris., § 24.

The complainant has no adequate remedy at law for the procurement of the relief to which it is plainly entitled. The provisions of the mortgage, when taken in connection with the manner in which the property has been acquired by the defendant, the Penn Plate Glass Company, create a clearly implied contract, enforceable in equity, on the part of the Penn Plate Glass Company, to insure for the benefit of the bondholders and the trustee. The insurance which has actually been effected by the Penn Plate Glass Company, in whatever terms the policies may be couched, must be presumed by a Court of equity to have been in fulfilment of this

obligation. And in view of the accident which has wiped out so large a part of the mortgage security, it would be a violation of good conscience for the Penn Plate Glass Company to retain the full benefit of the policies obtained by it. The trustee and bondholders should therefore be decreed in equity to have a lien upon those policies to the extent of their loss.

Accident, as is familiar to this Court, is a very ancient and well-known ground of equity jurisdiction. It means—

"an unforeseen and unexpected event occurring externally to the party affected by it and of which his own agency is not the approximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person under the circumstances to retain."

Beach on Modern Eq. Juris.. § 25, *note.*

It does not meet our contentions for the appellant to say that the plaintiff and the bondholders had insurable interests in the property which they might have covered by effecting insurance themselves; and that, in a suit at law upon the covenant, the damages, if any, would have been simply the cost of the insurance. This is not a suit at law, but a bill in equity, filed after the loss of the property, at a time when the insurance could not be effected by the trustee, which, moreover, never was in possession of any funds which it might have used to effect insurance.

We do not stand here as a mortgagee claiming that the covenant of the mortgagor to insure for our benefit is binding upon an innocent stranger purchasing the mortgaged property. That is not this case. We assert, and the facts set forth in the supplemental bill and proved by the evidence demonstrate the assertion, that the present owner of

this plant, the Penn Plate Glass Company, is not an innocent owner of this property, but became such owner under circumstances which estop it from denying its obligation to insure for the benefit of the bondholders, and render it inequitable that it should retain the whole benefit of the insurance effected by it upon the destroyed property. It would be a strange miscarriage of justice if such a man as the defendant Kann could with impunity, upon becoming the owner of mortgaged property by the methods pursued in this case, permit the existing insurance of the mortgagee's interest to die out, and, by reorganizing the company, and issuing new insurance in a new name, deprive the mortgagee altogether of the benefit of insurance—and this, particularly, when the loss has occurred during a protracted period of obstruction by him and his reorganized company of the mortgagee's matured right to possession of the property and a sale under foreclosure. It must not be forgotten that the principal as well as the interest upon these bonds is now due, *and has been due since the beginning of 1896*, and that the fire occurring in April of 1898, destroyed property which was *already* subjected to a *matured* mortgage debt of nearly three hundred thousand dollars, and against which the lien of the mortgage was in process of enforcement. As early as 1896 the Trustee had asked the Court to take possession of the property through a Receiver. These facts are of extreme importance. It is not as if the trustee were here asking a Court of *law* to fix the obligation of this insurance covenant upon a purchaser—even such a purchaser as the Penn Company—at a time when nothing was due under the mortgage, and before a fire had occurred, and before the lien of the mortgage had matured and was in process of enforcement. *For all equitable purposes the mortgagee was the owner of the property at the time when it was destroyed.* The title, of course, remained in the Penn Company, and would remain

there until a deed under a foreclosure sale. Indeed, the title would never vest in the mortgagee unless it saw fit to purchase at the sale. But its right, to the extent of the mortgage debt, to every dollar of *value* in the property up to the extent of its mortgage had accrued and was mature at the time of the first default. Its right to a sale matured months before the destruction of the property, and every dollar of the proceeds of sale, representing the *value* of the property, would have belonged to the mortgagee up to the amount of the mortgage debt.

The fact that a *decree* had not yet been entered cannot alter these facts. A decree does not *create* the rights of the mortgagee, it only declares them. Its effect is simply to *execute* the contract of the parties, and to enforce their several rights as they already exist. Hence, looked at from any point of view, it is impossible for the defendants to deny that the property, from the destruction of which they expect to reap such benefits in the collection of insurance, was, so far as its *value* was concerned, the property of the complainant. It is no answer to this to say that the insurance was only intended to cover the defendant's *equity* in the property. In the first place, the respondents are not proceeding on that theory, *because they are collecting the value, not of such equity as they may have, but of the entire destroyed property.* And in the next place, it must be remembered that long before the fire occurred the defendants had, in equity, as between them and the mortgagee, ceased to have any insurable interest in the property, or indeed any interest in it whatever. We cannot insist too earnestly on this point. When the defaults occurred under the mortgage, and the trustees' right to a sale of the property matured, the mortgagor immediately ceased to have any tangible interest in this property *as against the mortgagee.* The entry of a decree would add nothing to the

basic rights of the parties. And when it is further remembered that a decree would have been entered as far back as 1896 *but for the obstructive defenses interposed by the defendants Kann and the Penn Company, which they have now abandoned*, we submit, the Court should not hesitate judicially to impress the lien of the mortgage upon whatever insurance that company is entitled to. If this is not done, the Penn Company, by reason of its own unwarrantable obstruction of the foreclosure suit, will be able to collect from the insurance companies the *full value*, not simply of an equity of redemption, but of the entire destroyed property, which of right should belong to the mortgagee. But, if that obstructive defense had not been interposed, and if the foreclosure sale had preceded the fire, as it would have done but for that defense, will it be seriously contended that the equity of the Penn Company would have been worth the amount collected on the insurance, or anything like it? That Company bought subject to the mortgage with full notice of the mortgage, and is equitably entitled to obtain nothing out of the mortgaged property until after the mortgage debt is satisfied. If, therefore, this Court sustains the defense, the Penn Company will *profit* by the fire and become unjustly enriched at the expense of the mortgagee.

We submit that this consummation would be contrary to all equity, which looks at the substance of a transaction and disregards the form. The appellant seems not to appreciate that we are in a Court of equity, and not a Court of law; that we are seeking to enforce an equitable lien upon this insurance, and not suing at law upon a covenant. They assert that we must point to some contract, express or implied. There is no magic in these terms. A contract implied in law is really no contract at all. It is simply an instance of the operation of the law to prevent the working of a manifest injustice within the forms of law. In cer-

tain cases the law will compel a man to perform a duty by implying a promise on his part to perform it. One of the classes of implied contracts is well described by Lord MANSFIELD in *Moses* vs. *MacFarlen* (2 Burr, 1008), where he says:

"If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded in the equity of the plaintiff's case, as it were, upon a contract—*quasi ex contractu*, as the Roman law expresses it."

The instances in which contracts are implied in law are too multitudinous to cite.

"Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

*Ex parte Ford* (16 Q. B. D., 307).

The equitable foundation of implied contracts is clearly expressed by Pothier in writing upon such contracts in the civil law, from which we derive the principle.

"In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the *fact* from which it results. Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations in the same manner as actual contracts."

Pothier on Obligations, 113.

These authorities indicate the basis upon which is built the broad doctrine of implied contracts. Like constructive trusts, they necessarily depend on the circumstances of each case, and vary as infinitely as the transactions of men. If, then, it is necessary, in order to sustain the equitable lien of this complaint, to have some underlying *contrac-*

*tual* obligation, the facts in the case create a situation from which natural equity compels the implication of a *promise* on the defendants' part to hold a part of these insurance moneys *in trust* for the complainant, and to pay over the same upon the adjustment of its loss.

"That a case is novel, and not clearly within the limits of any adjudged case, does not warrant the denial of relief in equity."

Beach on Modern Equity Jurisprudence, § 1.

And in the case cited in the foot notes by Mr. Beach, p. 2, *Piper* vs. *Hoard* (107 N. Y., 73), the Court says, referring to the facts then before it:

"If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a Court in a civilized land in behalf of the perpetrator of the fraud."

From the above considerations it will be seen that this bill is not filed upon the narrow contention that the covenant to insure runs with the land. We are not concerned with that question. What we do claim is that with this covenant in the mortgage; with the insurance placed by the original company in pursuance of that covenant for the mortgagee's benefit; with Kann identifying himself with the mortgagor company and bringing it to speedy destruction; with the new company nothing but another name for Kann and his interests, and taking the property with full notice of his dealings; with both these parties fully aware of the mortgage, and of its contents, refusing to insure for the trustee's benefit, and deliberately permitting the former insurance to lapse, in spite of

the demands of the trustee; finally, with these same parties improperly opposing our settled right to be put in possession through a Receiver, and also obstructing the foreclosure, so that the fire occurred before a decree could be entered, but long after the trustee's rights had matured, and while the mortgage lien was in process of enforcement—with all these facts, we have made out a claim to the insurance effected by the Penn Company without regard to whether that company *intended* that insurance to inure to the benefit of the mortgagee or not.

The ground of our claim is the equitable obligation of the defendants, growing out of their dealings with this property, and it does not in any sense rest upon the *intention* of the Penn Company or Kann. In this connection, we wish to call the Court's attention to the argument of the appellant that even insurance effected by the *mortgagor* company would not be subject to a lien in favor of the mortgagee, although the mortgage contained a covenant to insure for the mortgagee's benefit, provided the insurance policy contained evidence that it was *not* the intention of the mortgagor to take out that policy in pursuance of the covenant. The appellant refers to the case of *Dunlop* vs. *Avery* (89 N. Y., 592), in support of that argument. But that case does not support it. The Court, on this point, says in the course of its opinion:

"The rule that when the mortgagor covenants to keep the buildings insured for the benefit of the mortgagee, that any insurance that may be effected *in the mortgagor's own name or for the benefit of the mortgagor* will be presumed to be in fulfillment of the covenant is well established, *but this presumption arises only in the absence of proof to the contrary*, and this is not the legal presumption when the policy itself provides for the payment of the loss to *another* incumbrancer."

The appellant understands this to mean that the presence of proof that the insurance was intended

by the mortgagor to cover only his *own* interest, *defeats* the presumption of law whereby the insurance is taken to be for the benefit of the mortgagee and a lien in the latter's favor is impressed upon it.

But a moment's reflection will show that that cannot be the meaning of the Court. In the first place, the *Avery* case was a fight between *two incumbrancers*—not between an *incumbrancer* and the *mortgagor*—in which the senior incumbrancer was seeking to wrest from the junior, insurance which the *mortgagor* had effected—not in its *own* name—but in the name of the *junior* incumbrancer. The mortgagor was under covenant to both incumbrancers to insure for their benefit, and it would clearly have been inequitable to give to the first incumbrancer insurance which was in terms the property of the second. That is what the Court held, declining to indulge the presumption above referred to "when the policy itself provides for the payment of the loss to *another incumbrancer.*" The Court does not say that the presumption would not be indulged if the policy provided for the payment of the loss to *the mortgagor.* On the contrary, that is the precise case in which the Court says the presumption *does* hold. The rule is well established, it says, when the insurance is effected "in the *mortgagor's* own name, or for the benefit of the *mortgagor.*" And this must, undoubtedly, be the rule; for, otherwise, it would be meaningless. There never would be a case in which the mortgagor could not adduce evidence that he intended the insurance to be for his *own* benefit, and not for the benefit of the mortgagee. The foundation for the rule is that *equity* requires such insurance to be impressed with a lien in favor of the *mortgagee.* The *Avery* case refers to and rests upon the case of *Cromwell* vs. *The Brooklyn Fire Insurance Company*, 44 N. Y., 42, in which the Court, alluding to this old established doctrine, says, p. 47):

"Where the assured has agreed to insure for the protection and indemnity of another person having an interest in the subject of the insurance, then such third person has an *equitable lien*, in case of loss, upon the money due upon the policy to the extent of such interest. These are principles of law well settled."

To claim, as the appellant claim, that the mortgagor can escape from the effect of this equitable lien by simply declaring that the insurance is limited to his *own* interest, is to deprive the rule of all efficacy—indeed, to do away with it altogether, and to permit the mortgagor to destroy the obligation imposed by equity upon him simply by denying the existence of that obligation.

In *Wattengel* vs. *Schultz* (11 Misc. 165), which, like the present case, was a foreclosure suit, a mortgage contained a covenant to insure and to assign the policies to the mortgagee. The mortgagor insured the property, but his policies were afterwards canceled and he died. Thereupon his administratrix took out new policies payable to the estate of the mortgagor. The property burned down and the insurance companies paid the insurance moneys to the administratrix of the mortgor. "The deceased did not assign the policies taken out by him to the plaintiff nor was there any reference therein to the plaintiff's mortgage, nor did the plaintiff avail himself of the right given him in the insurance clause of the mortgage to insure the buildings for his own benefit." Upon default, the foreclosure suit was brought and, among other things, the plaintiff prayed as relief "to have the lien of the mortgage declared upon the insurance moneys in the hands of the administratrix and have the same applied upon the plaintiff's mortgage."

It was argued among other things that the plaintiff had been negligent because of his failure to insure his own interest. But the Court granted the relief prayed :

"The administratrix has money that represents the real estate destroyed that was subject to the lien of the plaintiff's mortgage. * * * The husband's covenant to insure the premises, if not performed in his lifetime, can be enforced against his estate through his personal representatives to the extent of his assets in their hands. * * * In insuring a mortgage interest it *is not the debt* secured by the mortgage that is insured but the interest of the mortgagee in the property upon which his security rests. * * * And the proceeds of the insurance is to be distributed, when upon real estate, *as real estate*, and not as personal property. * * * The administratrix had the right to execute the covenant of the deceased, and it was her duty to do so, and when she took out the four policies *in the name of the deceased and of his estate*, the presumption is that she did it in the performance of that covenant, and as a continuation to the extent thereof of the insurance that had been effected by the deceased."

In *Cromwell* vs. *The Brooklyn Fire Insurance Company*, already cited, the owner of property agreed to sell it to another, the purchase price to be paid partly in cash and partly by mortgage, it being that the vendee should insure the property and assign the policy to the vendor to protect his vendor's lien. The vendee took possession and insured the property in his own name, loss if any payable to the vendor. But this insurance having come to an end, he renewed the insurance, *with the some company making the loss payable to himself only*. After a fire had destroyed the property, the assignee of the vendor served notice of his claim to an equitable lien on the insurance moneys on the insurance companies which, in spite of the notice, paid over the moneys to the assured (the vendee). In an action against the insurance company brought to enforce the equitable lien of the vendor on the insurance, the Court sustained the lien, and compelled the insurance company to pay the loss *over again* to the vendor's assignee.

"The plaintiff," said the Court, "notified the

company of his equitable lien to the insurance money before payment to Eichenlaube (the vendee). After such notice the company made the payment at its peril. * * * The company assumed the hazard of resisting the equity claimed by the plaintiff. * * * This claim does not operate as an assignment of the policy, against which the company by a condition of that instrument stipulated. They became, *by reason of the facts*, and the notice given by Cromwell, *trustees of a fund which they were equitably bound to pay to the party justly entitled*. The party entitled in this case was the plaintiff" (the vendor's assignee).

These cases show that even under the most unusual circumstances, where no doubt could exist that the assured was claiming the full benefit of the policies and seeking to deprive the mortgagee of them altogether, the Court will nevertheless presume that the policies inured to the benefit of the mortgagee and impress his equitable lien upon them.

The case of *Louden* vs. *Waddle* (98 Pa. St. 242), has not the slightest application to the present controversy. There was no question of covenants to insure in that case—it was not even a case of insurance effected by a mortgagor. The fact before the Court in *Louden* vs. *Waddle* were these: Certain administrators mortgaged a piece of real estate to their intestate's widow. She thus became *mortgagee* of a piece of property in which she also had a dower right. *She* insured her interest in this property and upon a loss collected the insurance. The question was whether this insurance could be considered as covering the mortgage debt as well as the estate in dower, so that the mortgage could be regarded as paid by the payment of the insurance. How such a case can be cited as an authority in the present discussion we are at a loss to understand.

The case of *Stearns* vs. *Quincy Insurance Company* (124 Mass., 61), does not conflict with the above authorities and reasoning. That was a case

of a covenant in a mortgage which made it incumbent upon the mortgagee to examine and approve the insurance effected for his benefit by the mortgagor. It contemplated action by the mortgagee. But the latter appears to have made no inquiry whatever and, indeed, to have had no knowledge of the existence of the insurance at all, until after the loss. Moreover, the condition required that the insurance effected for the benefit of the mortgagee should be for a sum not less than $3,200 (page 64), and the insurance actually taken out by the mortgagor was for only $2,500, only $1,500 of which covered property covered by the mortgage (page 64). All these facts were recited by the Court and its opinion was expressly based upon them. They make it clear that the mortgagor, in taking out the policies, was only insuring his equity—his own interest in the property—and it would have been plainly inequitable to permit the mortgagee, who had neglected to inquire or to protest or to make any attempt towards the fulfillment of his part of the condition, to seize insurance which was certainly not more than was adequate to cover the mortgager's own interest. In all these respects the case is directly opposite to the case at bar. Moreover, *Stearns* vs. *Quincy Insurance Company* was not a *cause in equity*. It was an action at law on contract, and the action was brought by the mortgagee *in the name of the mortgagor* on the theory that there had been an equitable assignment of the insurance. In deciding the case the Court took this ground for denying the plaintiff's remedy :

"Assuming that Andrews (the mortgagee) has an equitable claim to that part of the policy which covers the house," said the Court, "yet it is one which he cannot enforce in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be required to pay one loss by instalments

to different persons and be subject to two suits for the same cause of action, in favor of the same plaintiff."

No such objection can be made to the pending suit, which is upon a bill in equity and all of the parties are before the Court and the relief prayed is cast puposely in a form which will do equity on all sides.

The general rule referred to is well stated in *Wheeler* vs. *Insurance Co.*, (101 U. S., 439) at page 442), where the Supreme Court of the United States says:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extend of the mortgagee's interest in the property destroyed. * * * And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense."

From the above authorities, it is clear that if the insurance policies which have been taken out by the appellant, the Penn Plate Glass Company, had been taken out by the original mortgagor, the Pennsylvania Plate Glass Company, the complainant would unquestionably have had an equitable lien upon them to the extent of the loss under the mortgage.

But the appellant claims that this equitable lien does not exist as against policies taken out by the Penn Plate Glass Company, and they found that contention on the doctrine that the covenant does not run with the land. By this they mean that the facts from which equity would draw the right of the mortgagee to a lien on insurance effected by the Pennsylvania Plate Glass Company do not exist where the insurance was effected by the Penn

Plate Glass Company. But inasmuch as the whole lien, whether against mortgagor or some third person, rests upon *equitable* inference, it follows that if a *state of facts* exists from which it would be *equitable* to infer a right in the mortgage to a lien on the insurance, that lien will be inferred and impressed upon the insurance, whether the covenant does or does not run with the land. If, as we have endeavored to show, the assured bought subject to the mortgage and with a full knowledge of the insurance covenant and of the mortgagor's then existing fulfilment thereof, and bought and held the property under circumstances which in equity deprive it of the right to stand as a *bona fide*, innocent purchaser, and confound it, so to speak, with the original mortgagor itself, then equity must step in, just as in the case of the mortgagor's insurance, and for the same reason, and must impress upon the insurance a lien in favor of the mortgagee.

The case is clearly distinguishable from the case of *Reid* vs. *McCrum* (91 N. Y., 412). In that case, the assured was the innocent owner of the property, absolutely a stranger to the original ownership. He had obtained the property through a number of mesne conveyances, and had no connection with the mortgagor. There were present none of the circumstances which, in the present case, identify the assured with the mortgagor and make it as inequitable for the former as for the latter to deny the lien of the trustee. Moreover, as appears from the statement of facts in the McCrum case (page 413) the fire had there occurred *previous to the foreclosure*, and not, as here, long after the foreclosure was begun and was being obstructed by the defendant. The significance of the fact that the trustee's mortgage lien had already matured before the fire in this case has been amply discussed in preceding portions of this brief, and its effect upon the equities points out a broad ground of distinction between this case and that of *Reid* vs.

*McCrum.* That case, however, was argued on behalf of the mortgagee on the theory that the covenant to insure ran with the land, and it was because the Court took an opposite view on that bare point that the mortgagee's contention did not prevail. Here, we do not in any sense rest our claim on the theory that the covenant runs with the land, and the two cases are wholly different. The Court, in *Reid* vs. *McCrum*, referred to *Dunlap* vs. *Avery*, already quoted above on another point, and held that that case decided that a covenant to insure does not run with the land, and that, therefore, the matter was *res judicata*, "*unless some reason exists why the case cited should not be followed and adhered to.*" Reference to the *Avery* case would not seem to support the view taken of it in the *McCrum* case, that it definitely decided that such a covenant does not run with the land; but, however that may be, the Court, by the above quoted expression, expressly recognizes that there might arise a state of facts upon which it would not be proper to follow the ruling that such a covenant does not run with the land. That such a state of facts exists here we contend, claiming that while, as against a stranger purchasing this property, that covenant might have no effect, it bound the Penn Plate Glass Company, which was no stranger, but stood in the shoes of the Mortgagor Company, with even less equity as against the mortgagee than the Mortgagor Company itself possessed.

## IV.

**By the Terms of their Purchase, and under the Circumstances of this Case, the Defendant Kann and the Appellant bought subject to the Mortgage and assumed the Mortgage-Debt, or, at least, agreed to indemnify the Mortgagor against any Liability upon the Covenants of the Mortgage; and the Court below, having Jurisdiction of the Res and of the Parties, had Power, in order to prevent Circuity of Action, to enforce this Obligation by the Decree now appealed from.**

We now come to another ground upon which we contend that the decree should be sustained, wholly separate and apart from the grounds already advanced. The principles upon which we have relied in the foregoing points of our brief have had nothing whatever to do with the question as to the assumption of the mortgage debt by the purchaser, or the reciprocal obligations of the mortgagor and the appellant. In the present point, for the first time, we take up and discuss the case in that aspect.

The sale of the mortgaged premises to Kann by the Receiver Stoner on June 18th, 1894, was, as we have shown, made subject to the lien of the existing mortgage for $250,000; and the deed given to the purchaser on July 2d, 1894, recited that it was made "subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1."

One year later, and on July 1st, 1895, Kann conveyed the property to the appellant by deed, which recited that it was made "subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1."

It has already been pointed out that the considerations for which these two conveyances were made were $37,500, and $83,500, respectively. And it is admitted in the answer, as alleged in the supplemental bill, that both Kann and the appellant had, at the respective times when they purchased this property, not only the constructive notice given by the explicit mention of the mortgage in their deeds, but full, actual and complete notice of all the provisions, covenants and stipulations of the mortgage, including those relating to insurance.

At the argument before the lower Court, the appellant and Kann asserted that in spite of these facts they could hold the mortgaged premises free of the lien of the mortgage. This contention they have now abandoned, and they acquiesce in that part of the decree which directs a sale of the remnants of the mortgaged premises for the benefit of the bondholders. But they still deny that the terms of their purchase, or their actions after coming into possession, have raised any obligation upon their part upon or under the covenants in the mortgage. They deny that they ever assumed the mortgage debt, or that any obligation under the covenant to insure ever arose against them to indemnify the mortgagor in case it should become liable on that covenant. The object of this point of our brief is to show that they are wrong in those denials.

We agree with counsel for the appellant (Brief,

page 61), that for the purposes of determining the contract into which these parties have entered, the laws of Pennsylvania govern. Hence, those cases which in other jurisdictions distinguish the expression "*subject to a mortgage*" from the expression "*subject to the payment of a mortgage*" do not apply. The Courts of Pennsylvania, very properly, we think, draw no such distinction.

*Blood* vs. *Crew Ledick Company*, 171 Pa. St., 328.

Moreover, it must be remembered that this is not a case of an individual's mortgage upon a piece of land, the sale of the equity in which would leave the mortgagor fully as competent to meet the mortgage-debt as he was before such sale. We have here a mortgage made by a *corporation*, not merely upon a piece of land, but upon land, machinery, franchises, rents, issues and profits—in short, upon the entirety of the corporation –upon its whole property and stock in trade, owned at the time of the mortgage, or thereafter to be acquired (Rec. Vol. I, p. 24). And the sale of the equity of redemption at which Kann purchased, was not an ordinary sale by an individual, but a judicial sale, of all the property of every conceivable kind belonging to that corporation made in a proceeding to wind up the corporation's affairs and to put it out of existence. The necessary effect of such a sale is utterly to wipe out the mortgagor corporation, and to destroy, if not its legal existence, at least all its capacity to do business, to raise money or to pay its obligations. And one who knowingly, and with full notice of all the circumstances, purchases subject to such a mortgage, or at such a sale, can hardly be regarded as standing towards the vendor, or the mortgagee, in the same position as a mere individual purchasing at an ordinary sale subject to an individual's mortgage. The act of such a purchaser of corporate property must obviously

result in depriving the mortgagee of all hope of collecting his mortgage debt from the mortgagor. It must deprive him, moreover, of all hope of receiving the interest on his mortgage out of the income of the plant, except at the will of the purchaser. And if that purchaser is at liberty so to apply the income or not at pleasure, without running any other danger than that of having the property subjected to a foreclosure suit, the door would be opened to very great and very probable wrong to the mortgagee. For the purchaser, safe from personal liability, could mismanage the property at will, absorb its income, leave it unprotected and useless, and then be content to suffer the mortgagee to step in and seize the mere wreck of his security. Such certain evils should never be allowed to occur *in invitum*. The mortgagee is powerless to prevent them. He must stand aside—see his mortgagor swept aside—his security thrown into irresponsible hands—and do nothing. It will readily appear to the Court that, under such circumstances, the implied undertaking of a purchaser subject to a mortgage at such a sale must be vastly greater and more binding than in an ordinary case. It cannot be lightly assumed that the Court of Westmoreland County intended, when winding up this corporation and selling its property subject to an acknowledged mortgage, to work such injustice to the mortgagee.

We think it therefore clear that the appellant, by purchasing subject to the mortgage, took the property subject to an implied covenant on its part to indemnify the mortgagor against any liability to which it might be subjected by reason of the mortgage; and that, inasmuch as by the very terms of its purchase, it knew that the mortgagor was thus rendered powerless for all time to meet such liability, it practically, by purchasing subject to the mortgage, *expressly* agreed to pay the mortgage debt.

Even in the case of ordinary purchases subject to a mortgage, or to the payment of a mortgage, the law in Pennsylvania has always been that by such purchases the vendees at least impliedly agree to indemnify the vendors against liability on the mortgage.

*Campbell* vs. *Shrum*, 3 Watts, 60;
*Blank* vs. *Garman*, 5 W. & S., 42;
*Woodward's Appeal*, 38 Pa. St., 327;
*Moore's Appeal*, 88 Pa. St., 452.

For a long time a controversy pended in the Courts of Pennsylvania as to whether in every case of a purchase subject to a mortgage the transaction did not import *something more* than this indemnity; and some authorities held that such purchases *ipso facto* gave rise to an implied covenant, *enforceable by the mortgagee*, to pay the mortgage debt. The last word in this controversy, before it was terminated by the Pennsylvania Act of June 12th, 1878, P. L. page 205, was said in the case last cited above, *Moore's Appeal* (88 Pa. St., 452), which, though decided in 1879, adjudicated claims which arose prior to the passage of the act in question. In that case the Court said:

"An examination of the cases which have been decided on the legal effect of such a clause in a conveyance, shows, we think, that *unless there exist special circumstances to raise a covenant to pay the encumbrance*, it amounts only to an indemnity to the vendor."

And, arguing against the implication of any more extended covenant, the Court said further:

"*Surely something should appear to create the inference of such a covenant.* The words, 'under and subject,' import no such thing. They import that the vendee takes the land incumbered, and at most, that in taking it at an agreed consideration which includes the incumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied at the time."

Thus, then, something *might* appear—*special circumstances might exist*—to raise a covenant to pay the incumbrance. We have already pointed out, both in this division of our brief and in prior divisions, a number of *special circumstances* which tend strongly to raise such a covenant from the purchase subject to our mortgage.

Now, when the act of 1878 was passed it is very plain that its object was to put a quietus upon all this controversy about the meaning of the bare expression "subject to a mortgage" in a deed of the equity. And to use the words of Judge BUFFINGTON (Rec., Vol. II, p. 183) the act "provided that the under and subject clause *alone* should not be construed to create a personal liability for the debt, that is a direct assumption to the owner, but left unaffected the implied covenant to indemnify, as between vendor and vendee."

The language of the act makes it apparent that this was its sole object:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall, by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability therefor; *Provided*, that the use of the words "under and subject to the payment of such ground rent, mortgage or other incumbrance shall not *alone* be construed so as to make such grantee personally liable as aforesaid."

The appellant's counsel argue strenuously that this act completely demolished not only the inference of the assumption of the mortgage debt claimed by some authorities to arise from the words "subject to a mortgage," *alone*, but also the inference of an agreement to indemnify the mortgagor against liability on the mortgage. We

have, however, shown the origin of the act springing from the midst of the controversy mentioned. And the above quotation, when compared with the passages quoted from *Moore's Appeal*, shows that the same idea was uppermost in the minds of the Legislature which swayed the Court in that decision, namely, that while the covenant as to indemnity between vendee and vendor must always be inferred from the bare words "subject to a mortgage" contained in a deed of the equity, yet, those words *alone*, that is, in the absence of *special circumstances*, should no longer be construed by any authority to imply a covenant to assume the mortgage debt. Under the act, as before its passage, the indemnity covenant must always be inferred; under it, as before, when *special circumstances* exist, the covenant to assume the mortgage debt may still be implied; but unless such special circumstances exist, the words "subject to the payment of the mortgage" or their equivalent are not *alone* enough to imply a covenant to assume the mortgage debt. That this is the effect of the statute is to be gathered from the decisions in *Lennox* vs. *Brewer*, 160 Pa. St., 193, and *Blood* vs. *Crew Ledick Co.*, 171 Pa. St., 339. In the latter case the question squarely arose whether the Act of 1878 would prevent the enforcement of the implied covenant of indemnity against the vendee at the suit of the vendor, and the Court held that it would not:

"The Act of 1878 plays no part in this case. *The action is not brought by the holder of the mortgage to assert a personal liability against the vendee.* and for that reason the act does not apply."

IT FOLLOWS FROM THE ABOVE CONSIDERATIONS THAT IF THE SPECIAL CIRCUMSTANCES OF THIS CASE ARE SUCH AS WE CLAIM THEM TO BE, THE LAW WITH THEIR HELP WILL IMPLY FROM THE PURCHASE

OF THE PROPERTY SUBJECT TO THE MORTGAGE A COVENANT ON THE PART OF THE APPELLANT TO PAY THE MORTGAGE. IF, ON THE OTHER HAND, THEY ARE NOT SUCH AS WE CLAIM THEM TO BE, THEN THE LAW WILL STILL IMPLY A COVENANT ON THE PART OF THE APPELLANT TO INDEMNIFY THE MORTGAGOR AGAINST ALL LIABILITY ON THE MORTGAGE.

Now, with one or the other of the above-implied covenants certainly in existence, can it be successfully contended that, under the circumstances of this case, the liability of the vendee did not extend to the mortgage-provision as to insurance? We have already seen how that provision was only one of a number of stipulations contained in the mortgage for the better securing of the debt and enforcing of the mortgagor's liability upon it.

"The duty to insure," to quote from the opinion of the Court below, "was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the Supreme Court in *Miller* vs. *Aldrich*, 31 Michigan, when speaking of the relation of a covenant to insure to the mortgage: 'Chapman had bound himself to afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and on all others in his shoes with notice. Now if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt" (or to assume the mortgage debt) "shall he *not much more* be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of ensuring the payment of such mortgage debt."

This becomes the more clear when the provisions of the mortgage are recalled. By those provisions, the possession of the property is made to depend upon the fulfilment of the covenants, stipulations and agreements of the mortgage. These include the covenant to insure. For a default in any one of these covenants, the mortgaged property becomes forfeited to the mortgagee, without regard to whether the property is still in the hands of the mortgagor or sold to a purchaser subject to the mortgage. The right of the appellant to hold the property as against the mortgagee depended upon the fulfilment of the covenant to insure by the mortgagor. Can it be said, with such a provision in the mortgage, that the purchase of the property under circumstances which the purchaser knew must forever prevent the mortgagor from fulfilling that covenant, did not contemplate the inclusion of that covenant in any liability which the purchaser assumed?

The appellant's counsel seek to overcome the obvious force of these considerations by pointing (Brief, page 99) to *a part of* Article Fourth of the mortgage. Had they quoted the whole of that article, the fallacy of their argument would have been apparent in their own pages. We will here quote the entire article:

"ARTICLE FOURTH.—At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustees, or any other power of sale heretofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bond-

holders, at a reasonable price, if but a portion of the property be sold, or if it all be sold, at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said Trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

"It being expressly understood and agreed by and between the parties hereto, and by and between the said parties of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupon, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned or transferred, except such suits or proceedings, as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

The meaning of the above clause in the mortgage is plain. It takes away the right of the *bondholders* to bring suits upon the bonds when once the powers of the mortgage for the enforcement of the security have been fully exercised by the Trustee. In other words, when a sale of the mortgaged property shall have taken place, the right of bondholders to sue *on the bonds* shall cease. But until such sale shall take place, the right to collect the face value of the bonds with interest necessarily resides in every bondholder. No sale having taken place, Judge Buffington was clearly right in disregarding this provision of the mortgage (Record, Vol. II, p. 181). But even if a sale had occurred, we submit that Article Fourth would not and could not have the effect attributed to it by the appellant's counsel. They argue that by this clause all personal obligation on the mortgage debt was done away with. But it is inconceivable that bonds should be outstanding, which by their terms bind the obligor to pay a debt evidenced by them, and yet be devoid of any obligatory force. And it is equally inconceivable that there should exist a *security* for a debt, such as a mortgage must necessarily be, and yet there be no debt to secure. By the terms of the mortgage the parties may, if they please, restrict or do away altogether with the *remedies* for breach of the covenants of the bonds and mortgage, or either of them; but it is impossible, in the nature of things, for them to destroy the *obligation* of the bonds so long as the bonds themselves endure or the mortgage continues to be a mortgage.

Now, this reflection is a very important one. For the appellant's counsel, in arguing from this clause, overlook the distinction between the obligation—that is, the liability on the debt—and the enforcement of that liability. We might concede the impossibility of enforcing such liability (which we do not concede, however,) without im-

pairing the liability itself. The situation, in such case, would be precisely similar to the situation of a cause of action barred by a statute of limitations. The cause of action would still be intact and entire; its enforcement alone would be frustrated.

The importance of this distinction lies here: that in the present case there is no attempt to *sue upon the bonds*, which is the only remedy prohibited by this restrictive clause. The appellant's counsel say that as there is no personal obligation on the mortgagor's part to pay the mortgage debt there can be no implied covenant on the part of the purchaser of the equity either to pay the mortgage debt, or to indemnify the mortgagor. The error of this argument is made manifest, we think, by the above distinction, and lies in the assumption that because one of the remedies of the obligee may be restricted, or destroyed, the personal obligation on the bonds has terminated. There *is* such a personal obligation still resting on the mortgagor, and hence there is no such difficulty about the inference of a covenant as the appellant's counsel assume.

But our adversaries may say: Of what value is this obligation, if it cannot be enforced? To this we answer that we are not seeking to exercise that remedy which, allowing the utmost to the other side, this provision prohibits. No bondholders are here seeking to enforce the personal liability on the bonds, nor indeed is the trustee—to whom, by the way, the clause in question does not extend—seeking to do anything of that character. But what we are trying to do is to enforce, on behalf of the trustee, and in a Court of equity, *the covenant as to insurance*, which is not in any sense the covenant to pay the mortgage debt. Undoubtedly, as we have argued above, that covenant to a very great extent flows out of the prior obligation to pay the mortgage debt. But it flows as much out of the necessity to protect the security of the mortgage. The obligation

to pay the bonds might exist without the mortgage, the covenant to insure never could. While closely connected, the two obligations are nevertheless several and distinct, growing out of the same *debt*, to be sure, (a debt which, as we have shown, still exists in spite of the Fourth Article), but requiring different *remedies* for enforcement. Hence Article Fourth has no application whatever to proceedings, either direct or indirect, upon the covenant to insure, and cannot affect the duty of the Court to imply a covenant to insure on the part of the purchaser, or at least a covenant to indemnify the mortgagor against all liability upon the covenant to insure. The plain truth is that, upon the transactions of this case, the purchaser assumed the whole mortgage. It simply stepped into the shoes of the mortgagor, and is liable upon any covenants upon which the mortgagor was liable. We assert that this liability is direct, as between the appellant and the mortgagee, because of the *special circumstances* already discussed. But if the Court should differ with us on that point, we still insist that the appellant is liable on these covenants by virtue of the implied covenants of indemnity as between it and the mortgagor.

If the Court should adopt the first of these positions nothing more need be said. The liability of the appellant being direct upon the covenant to insure, we have shown in a prior part of this brief the equities which entitle the complainant to receive the proceeds of the appellant's policies to the extent of the mortgage.

On the other hand, if the Court should adopt the second of the above positions, then it would still seem clear that the obligation upon the implied indemnity could be enforced in this suit. In that view of the case the proposition which would govern is so well stated by our opponents in their brief (page 95) that we quote it here :

"The purchaser of land subject to a mortgage who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624–625.
*Fuller* vs. *Hughes*, 12 N. Y., 79."

It is no answer to this point to say, as the appellant's counsel do in their brief, that there has been no breach of the covenant of indemnity. We have already pointed out that the appellant necessarily knew when it bought this property that by that very purchase it was certainly depriving the mortgagor company for all time of the power to carry out the covenants of the mortgage or to pay the mortgage debt. To have sued the mortgagor company upon the covenant to insure would have been the most idle farce. What property has the appellant left to the Pennsylvania Plate Glass Company with which that company could meet a judgment obtained in such a suit? To require such a suit as a preliminary to the present proceeding would be a travesty on justice. The result is as certain to-day as if the action had been brought and ended; and the procedure by which the mortgagor and the appellant have been joined together in this one suit is manifestly the right one. Nor is it conceivable that the complainant should be compelled, before insisting upon its claim to the insurance, to complete the foreclosure and sell the remaining property; that property is now but a remnant. It needs no auction sale to prove that

the mortgage debt will never be satisfied out of the proceeds of the sale. Moreover, the decree is carefully drawn to subject the proceeds of that sale primarily to the mortgage debt; and it is only in the event of that fund's proving insufficient that under the decree the insurance is to be drawn upon at all. Suppose the trustee had already procured a sale in foreclosure of the remaining property; suppose it had thereafter brought suit against the mortgagor for the balance of the mortgage debt, and obtained an uncollectible judgment in that case. In what way would there be any actual change from the present situation, where we *have* a decree of foreclosure and sale with the mortgagor company before the Court, and the insurance fund subjected only to the excess of the mortgage debt over the proceeds of the foreclosure sale? Nothing would have been added to our cause of action by such proceedings, and the Court would be in no better position than it now is to administer the equities among the parties. All those parties are here, the property is here, the insurance fund is here. The mortgagor company is known to be paralyzed and penniless, thanks to the purchase of all its property and franchises by the appellant. The result of a suit against the mortgagor company has been certain from the beginning and made so by the very act of the appellant whereby it took the property subject to the mortgage.

The balance of the argument is forcibly stated by Judge BUFFINGTON, in his opinion, and we quote it below:

"The proofs show that request to insure was duly made by the trustee upon the mortgagor and upon the subsequent purchasers which request was not complied with. It would therefore seem that by such failure to insure there was a default and a direct liability of the mortgagor to the trustee upon the covenant to insure and there was a default and a liability of the subsequent purchasers to the mortgagor upon their agreements to indem-

nify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months it became such a breach as warranted the trustee in either taking possession, selling at non-judicial sale or maintaining foreclosure proceedings.

" After the bill was filed, a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a Receiver to take possession of the mortgaged premises as we have noted above.

" Under the facts it would seem that a Court of equity having jurisdiction of the subject matter and of all parties, had power to, and to avoid circuity of action, would direct ths purchaser to insure for the benefit of the trustee.

" This Court had jurisdiction of the mortgage and therefore of the mortgagor and mortgagee. Kann and The Penn Plate Glass Company, who had bought subject to it, were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that where equity jurisdiction has once rightfully attached to a controversy it will be made effective for the purpose of complete relief and to dispose of all incidental and germane questions. Fetter on Equity, page 13; Winton's Appeal, Pa. St., 97, P. 395; Allison's Appeal, 77 Pa. St., 227; McGowan *vs.* Remington, 2 Jones, 63; Souder's Appeal, 57 Pa. St., 498; Soucher's Appeal, 104 Pa. St., 615. The Trustee having exercised its right of requiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the Court, it would seem clear to us that a Court of Equity, by its very nature constituted with plastic power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A Court of Equity having original iurisdiction to compel specific performance of a contract to indemnify.—Chamberlain *vs.* Brown, 6 Blackf., 490; Champion *vs.* Brown, 6 John. Ch. Rep., 398, Fry on Specific Performance (3 American Edition) p. 704,—its

jurisdiction and power to do so in this case where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where moreover the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the Court did not see fit in an interlocutory stage of the case to make such order, that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so, cannot affect the relative right of the parties. Mere lapse of time will not prevent a Court of Equity from affording relief where there was a right to relief when the bill was filed. Wilkinson *vs.* Torkington, 2 Younge & Collyers Reports, 729.

"Pending the appointment of a Receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it had never paid, to wit: the $250,000, representing deferred purchase money.

"Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the Court as to its liability to do so, why should not the Court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party to this litigation under stress of an application for the appointment of a Receiver and a consequent exclusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee and was bound to do so if thereto required by the Court. When now on final hearing the proceeds of that insurance is before the Court, when the position of the parties has not been changed, why should not this Court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order.

"The position of the parties has not changed. To say that the trustee had an insurable interest

and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers with full knowledge of that duty on the part of the mortgagee, took the property and undertook to indemnify the vendor against this covenant. This they have not done. They paid some $83,000 for the property. They insured it for more than three hundred thousand dollars and now on the destruction of the property, which was the substantial security for $250,000 owing the trustee, they seek to avoid payment of the $250,000 and to realize on the $83,000 paid by them the sum of upwards of $300,000 in insurance upon property for which they have never paid.

"The allowance of such a result under the facts and circumstances would be highly inequitable, for it is a principle of equity that in a contest between one who is seeking to make a gain and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. Miller *vs.* Aldrich, 31 Mich., 416."

## V.

## Interest was properly allowed on the coupons.

"That interest is recoverable upon coupons from the time they are in default is universally conceded. This interest is allowed by way of damages as a compensation for the delay of payment."

Short's Law on Railway Bonds and Mortgages, p. 104, and cases cited.

This is the uniform rule in the United States Courts and has been applied over and over again throughout the States by those Courts.

*Gelpcke* vs. *Dubuque*, 1 Wall., 206 (Pa.).

*Aurora* vs. *West*, 7 Wall., 105 (Ind.).

*Clark* vs. *Iowa City*, 20 Wall., 589 (Iowa).
*Town of Genoa* vs. *Woodruff*, 92 U. S., 503 (N. Y.).
*Walnut* vs. *Wade*, 103 U. S., 696 (Ill.).
*Scotland County* vs. *Hill*, 132 U. S., 117 (Mo.).
*Commissioners* vs. *Aspinwall*, 21 How., 159 (Ind.).
*Koshkonong* vs. *Burton*, 104 U. S., 676 (Wisc.).
*Cromwell* vs. *County of Sac*, 96 U. S., 62 (Iowa).
*Hollingsworth* vs. *Detroit*, 12 Fed. Cas., 352 (Mich.).
*Pana* vs. *Bowles*, 107 U. S., 529.

The rule of the New York Courts that coupons only bear interest after negotiation by the owner of the bonds and when in the hands of a different person from the owner of the bonds, does not obtain in the United States Courts.

*Railway Co.* vs. *Sprague*, 103 U. S., 761.

Nor in the Courts of Pennsylvania:

*County of Beaver* vs. *Armstrong*, 44 Pa., 63.
*Railroad* vs. *Fidelity I. T. & S. D. Co.*, 105 Pa., 216.
*Railroad* vs. *Smith*, 105 Pa., 195.

Counsel for the appellant are wrong in stating on page 104 of their brief that there is no provision in the bond for coupons. The form of bond *and coupon* is set forth in the mortgage (Rec. Vol. I, pp. 20–21) being introduced by a reference in the mortgage itself to the bonds and "coupons or interest warrants accompanying the same" (X. *Ib.*, p. 19).

There is nothing in the suggestion of counsel that the lien of the mortgage does not extend to

interest on coupons. As well say that the lien of the mortgage does not extend to interest on the bonds themselves after their maturity, when such interest is of course not represented by coupons, and yet must clearly be included in a foreclosure decree as part of the amount due. Both as to mature bonds and mature coupons, the interest is allowed by way of damages "as a compensation for the delay of payment" and is covered by the lien of the mortgage as an incident to the debts evidenced by the bonds and coupons.

**The decree of the United States Circuit Court for the Western District of Pennsylvania should be affirmed with costs.**

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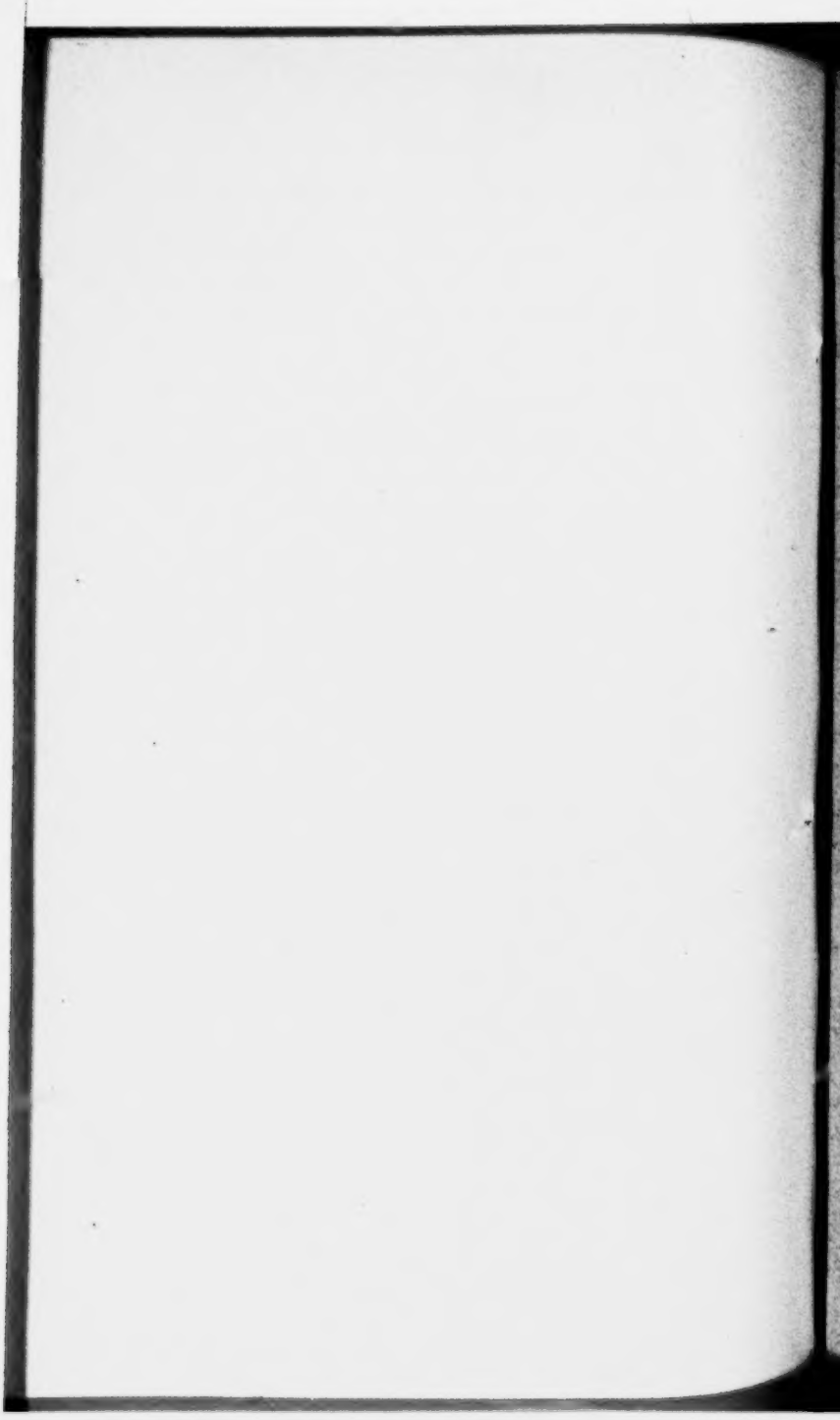

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No. 180.

By Johnson, Turner & Ferguson
for Petitioner

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 180.

Filed April 10, 1902.

THE FARMERS' LOAN AND TRUST COMPANY,
TRUSTEE,
*Petitioner,*

*vs.*

THE PENN PLATE GLASS COMPANY AND WILLIAM L. KANN.

---

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.**

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**Brief for the Farmers' Loan and Trust Company, Petitioner.**

---

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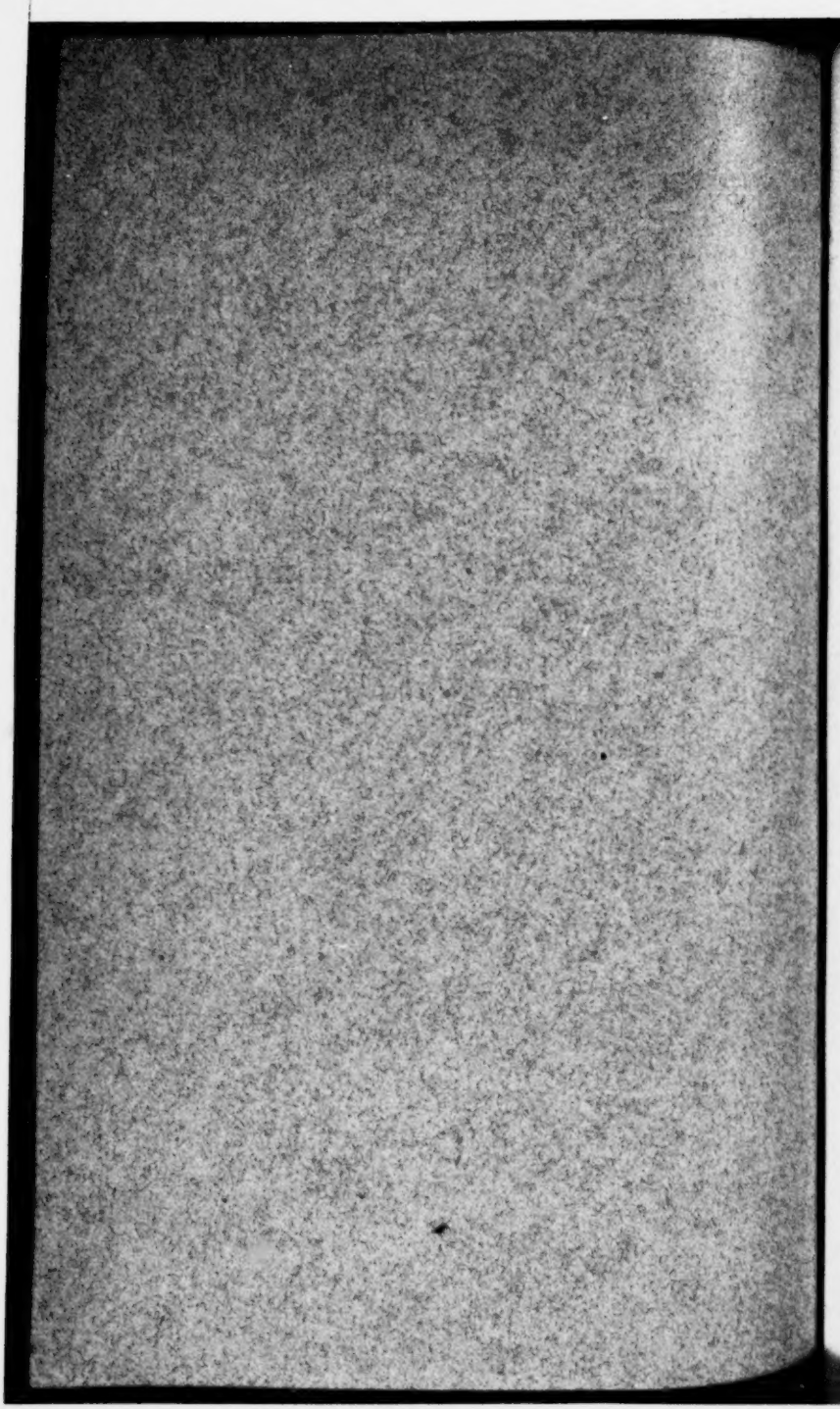


# Supreme Court of the United States.

OCTOBER TERM, 1901.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
Petitioner,

*vs.*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN.

No. 180.

This is a proceeding to review the action of the United States Circuit Court of Appeals for the Third Circuit in reversing a decree of the Circuit Court, in the above entitled cause.

## Statement.

On January 1st, 1891, the *Pennsylvania* Plate Glass Company (a Pennsylvania corporation) made a mortgage to The Farmers' Loan and Trust Company, a New York corporation, to foreclose which mortgage the original bill in this cause was filed in the Circuit Court of the United States for the Western District of Pennsylvania. The mortgage covered the franchises, plant and buildings of the Mortgagor Company, including a specified tract of land in Irwin, Westmoreland County, Penn-

sylvania, with certain gas and water contracts, and all the other property, real or personal, then owned or thereafter to be acquired by the said Pennsylvania Plate Glass Company, including rents, issues and profits (Rec., p. 27).

This mortgage was made in trust to secure six per cent. bonds which were issued to the amount of $250,000 of principal. The Plate Glass Company began to do business and was reasonably successful, and the bonds were sold for money and passed into the hands of innocent holders.

Subsequently, the defendant, William L. Kann, had his attention called to the Plate Glass Company. Finding that it was likely to be affected by financial depression, he nevertheless deliberately loaned it money, entered the Board of Directors, and became Treasurer. It was not long before his proceedings as a creditor forced the directors to authorize a proceeding in the Court of Common Pleas of Westmoreland County, Pennsylvania, to procure the judicial dissolution of the Pennsylvania Plate Glass Company. In that suit, Joseph W. Stoner, one of the directors, was, on March 19th, 1894, appointed Receiver, and entered into possession accordingly (Rec., pp. 353-362; 411-416; 442-445; 450-457; 463; 474-478; 420-435).

The Trust Company was not a party to those proceedings and the result was an order of the Westmoreland Court for the sale of the property by the Receiver, *subject to the lien of the existing mortgage for $250,000*. Accordingly, on the 18th of June, 1894, the Receiver sold the property so subject to the mortgage at public auction. The property, it will be noted, was not sold subject to any possible claim that might be proved to exist, but subject to this particular mortgage for this *specified* amount of $250,000, fully described in the order of sale and in the terms of sale.

The defendant, W. L. Kann, officer and creditor of the company, who had precipitated the entire proceeding, became the purchaser, the price being $37,500. On July 2nd, 1894, a deed was, by order of the Westmoreland Court, given by the Receiver to Kann. It distinctly, and in accordance with the express terms of the order, recited that the conveyance was made "*subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1*" (Rec., pp. 469-470). This was the mortgage now in process of foreclosure.

Kann retained the title for one year, during which he paid the interest on all the bonds represented by the coupons which fell due July 1st, 1894, and January 1st, 1895, respectively (Rec., pp. 60, 61). These, however, were the last coupons paid, for, on the 1st day of July, 1895, the very day upon which another instalment of coupon interest fell due, *a new company just organized by Kann* under the name of the PENN PLATE GLASS COMPANY, of which he was president, and which is the contesting defendant in this case received a deed of the property from Kann; and it deliberately permitted the coupons falling due on the same day to be defaulted.

The old Company had thus fallen into the power of Kann; the purchaser at the forced sale of its property was Kann; and the new Company was Kann.

The deed given to the new company by Kann on the first of July, 1895, the day of the first default, expressly recited, as did the original deed by the Receiver to Kann himself, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the*

*Farmer's Trust and Loan Company, of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891. recorden in Westmoreland County, in Mortgage Book 43, page 1.*" The consideration set forth in the deed from Kann to the Penn Company was $83,500.

Upon the default in the payment of coupons, the Trust Company served written demands for their payment upon the defendants, the Pennsylvania Plate Glass Company, W. L. Kann, the Penn Plate Glass Company and Joseph W. Stoner, Receiver (Rec., pp. 100-101). Six months having elapsed, and these defaults still continuing, the Trust Company, following the terms of the mortgage, by written instrument declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., p, 62), and two days later, on the 8th day of July, 1896, it filed its Original Bill for the foreclosure of the mortgage.

The original company that made the mortgage, the Pennsylvania Plate Glass Company, the grantee William L. Kann, and the subsequent grantee, the Penn Plate Glass Company, were made parties defendant to the foreclosure suit. No defense was made by the Pennsylvania Plate Glass Company, but the defendant Kann, acting in his own name and the name of the Penn Plate Glass Company, saw fit to demur to the suit, and, later on, to file a joint and several answer. (Rec., pp. 41-52).

The demurrers were overruled, the answer and the replication were filed and the taking of testimony was begun on April 12th, 1897. (Rec., pp. 56-57).

In July, 1896, at the beginning of the foreclosure suit, the complainant *being a trustee without funds* and the bondholders being scattered, the complainant made a motion for a receiver, which the court denied. (Rec., pp. 43-44).

We submit, and press the point, that the complainant was unquestionably entitled to a receiver at that time. There were three instalments of coupon interest overdue and unpaid and the principal had, by the express terms of the mortgage, matured. *The receivership was, moreover, essential for the purpose of protecting the interests of the trustee and bondholders from possible loss by fire.* This was expressly urged as one of the most important grounds for the Court's taking possession of the property on behalf of the trustees, and it resulted in the giving by the defendants of the undertaking relative to insurance hereafter more fully referred to. (Rec., pp. 437-439). The Pennsylvania Plate Glass Company, and its receiver, Stoner, recognizing the obligation imposed on them by the mortgage, had kept the property insured for the benefit of the mortgagee. But Kann and the Penn Plate Glass Company, in spite of the protests of the mortgagee, had allowed all this insurance to lapse, had failed to insure for the benefit of the mortgagee and were neglecting and refusing so to do. The desired relief having been refused, the property remained in the possession of the Penn Plate Glass Company, insured by it, to be sure, but not in terms for the benefit of the mortgagee or the bondholders. Indeed, the interests represented by Kann, although taking out policies to the amount of over $400,000, took pains to insert the following clause in their policies:

"This property is subject to a bonded indebtness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders."

When it is remembered that the company which took out these policies defaulted on the coupons from its very organization, it becomes clear that the

intention was to try and defeat the mortgage by the defenses which have failed in this case, and thus be enabled to collect the entire value of the plant as if no mortgage existed.

By the refusal of the Circuit Court to grant a receiver who might at once insure the property FOR THE BENEFIT OF WHOM IT MIGHT CONCERN, a great and overwhelming injury was done to the bondholders, for on April 12, 1898, a very great portion of the property was destroyed by fire. (Rec., p. 387). The ruins afterwards sold for scarcely enough to pay costs.

The defendants had just closed their testimony under the original bill, so that at the time of the fire the complainant was still being prevented by the defendants from obtaining a decree of foreclosure and sale, under defenses which were overruled in the decree on the strong ground that they did not in law constitute defenses to a foreclosure suit, and which the defendants themselves *abandoned* on their appeal to the Circuit Court of Appeals.

The complainant hastened to file its supplemental bill, the object of which was to impress the lien of the mortgage upon the insurance effected by the defendant Kann, in the name of the Penn Plate Glass Company (Rec. pp. 377-390). Under this bill the Insurance Companies were made parties defendant. The defendants Kann and his Company demurred to the supplemental bill as they did to the original bill. These demurrers were also overruled by the Circuit Court (Rec., p. 397). Thereupon the defendants filed a joint and several answer to the supplemental bill (Rec., pp. 398-404). Replication was filed (Rec., p. 404), and testimony taken by both sides. A receiver of the insurance moneys was appointed by the Court, who was directed to collect and hold subject to the final

order of the court $125,000 of the insurance moneys, which he has accordingly done.

Mr. Wertheimer, the owner of 160 bonds, being a relative of the defendant Kann, and one of the incorporators of and parties interested in the new Company (Rec., p. 426), threw in his weight with the defendants and stipulated that he would make no claim to anything received from the insurance moneys, and hence the payment of $125,000 was fixed upon as being sufficient to cover the 90 other bonds with costs and charges.

The final decree was rendered July 25, 1899, in the United States Circuit Court by the Hon. Joseph Buffington, District Judge (Rec., pp. 503–512). This decree ordered the foreclosure of the mortgage and a sale of the property, unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master to ascertain and report which of the bonds were entitled to the security of the mortgage, etc., and ordered the sale of the property as an entirety, etc. THE DECREE FURTHER HELD THAT THE TRUSTEE WAS ENTITLED TO AN EQUITABLE FIRST LIEN UPON THE INSURANCE AND INSURANCE MONEYS TO THE EXTENT OF ALL THE VALID OUTSTANDING BONDS SECURED BY THE MORTGAGE; and inasmuch as a receiver of the insurance moneys had been appointed under the supplemental bill, and a very large part had been collected by him, the Court proceeded to order the application of such moneys to the payment of the bonded debt, etc.

Bonds were outstanding to the amount of $250,000, and the testimony shows that Kann did not pretend to have paid more than $37,500 for the property or to have expended upon it prior to turning it over to the new Company one year later more than enough to bring the whole price with interest up to $83,500, the amount

of the consideration named in the deed which he made to the Penn Plate Glass Company. Even adding the full amount of the improvements carried out by the Penn Company under Kann's contracts, the cost of this equity in the property to the Penn Company was only $118,000 (Rec., pp. 361-362). Defendant's counsel, seeking to show that the value of the equity covered by the policies was much greater, quoted below some testimony of Kann's which shows that up to the date of his testifying (which was in 1898) the defendants had spent about $200,000 in improvements. But we are considering the value of the equity as stated in the policies which were all taken out by Kann and the Penn Company "at the time of their respective purchases of the property" as counsel for the defendants insisted. At that time the property, including the price paid at the receiver's sale, had cost the defendants only $118,000. These figures are eloquent and speak for themselves when compared with $450,000, the insurance claimed to have been placed at that time upon the equity alone. But even if we take the figure given by Kann as the full cost of the improvements, namely, $200,000, and add $37,500 paid for the property at the sale, there is still a long way to $450,000. And yet the property subject to the mortgage is the property covered by the policies, which policies expressly declare it to be covered by a mortgage of $250,000. The fact, then, that some $400,000 of insurance have been actually collected is one of great significance. The Insurance Companies have paid in this fund, in this cause and under order of the Court, a portion of it is retained by the Receiver to be paid to the party whom the Court decides to be entitled to it. Is this party the defendants, who, in the policies themselves, admit the existence of a mortgage lien of $250,000, and yet seek to collect the

*full* value of the destroyed property? Or is it the holders of the bonds whose mortgage covered the plant ruined under the circumstances above outlined?

The case comes before this Court on a writ of certiorari issued upon the application of the Complainant. In the lower Courts Judges Acheson and Buffington had decided in favor of the Complainant, while Judges Gray and Dallas had taken a contrary view. The matters involved are of great gravity and include the decision of very weighty points of law.

## Specification of the Errors Relied on.

1. The learned Circuit Court of Appeals erred in reversing the decree entered by the Circuit Court for the Western District of Pennsylvania.

2. The learned Circuit Court of Appeals erred in not affirming the decree entered by the Circuit Court for the Western District of Pennsylvania.

3. The learned Circuit Court of Appeals erred in holding that the Trustee of a mortgage to it executed by the Pennsylvania Plate Glass Company, to secure certain bonds issued by said Glass Company, was not entitled to the benefit of moneys realized under policies of insurance of the mortgaged premises paid, after a fire had occurred, to the successor in title of said Pennsylvania Plate Glass Company which had taken a conveyance of said mortgaged premises subject to the mortgage.

4. The learned Circuit Court of Appeals erred in holding that under said mortgage, the mortgagor was not obliged to effect insurance for the benefit of the trustee of the mortgage.

5. The learned Circuit Court of Appeals erred in holding that the conveyance to the ultimate grantee of the mortgaged premises, subject to the mortgage, imposed no duty upon such grantee, either in favor of the original mortgagor, or by subrogation to the rights of such mortgagor, in favor of the mortgagee, to insure the mortgaged premises.

6. The learned Circuit Court of Appeals erred in holding that the fund raised by insurance of the mortgaged premises, effected by the ultimate grantee, which had taken under and subject to the mortgage, was not impressed, under all the circum-

stances of the case, with an equitable lien, in favor of the trustee of the mortgage.

7. The learned Circuit Court of Appeals erred in holding that by virtue of an obligation entered into at the time of the refusal of a motion for a Receiver of the mortgaged premises, made after default by the trustee of the mortgage, there was no right on the part of the trustee to claim the benefit of moneys paid upon policies of insurance of the mortgaged premises to the grantee of the mortgagor.

## FIRST.

### Without regard to any provision in the mortgage, the Complainant has an equitable lien on the Penn Company's insurance, and, under the circumstances, that company must be treated as in the position of a Receiver.

When the complainant filed its original bill and applied to the Circuit Court for a Receiver, $250,000 of principal and a large amount of interest was overdue and unpaid. The defendants had also broken other covenants of the mortgage. By the express terms of the mortgage and by the ordinary rules of equity the complainant was entitled to the immediate appointment of a Receiver. The action of the Circuit Court in denying the motion was error, but inasmuch as the property has remained in the hands of the defendants, who have collected its income, the error can be rectified.

It would have been the first duty of a Receiver to insure, using for that purpose the income which the defendants have thus collected. That duty has been performed by the defendants, in person, and the insurance money must be applied to the benefit of the mortgage trustee.

In order that there may be no possible mistake let us examine carefully certain provisions of the mortgage itself, which will be found on page 31 of the record:

"Article Second: In case default shall be made in the payment of any instalment of interest on any of the aforesaid bonds, according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement or stipulation herein contained and hereby required to be kept and performed by the said party of the first part, and if such default should continue for a period of six months, after demand made in writing by said trustee upon the said party of the first part for the payment of the said moneys, or the performance cessor said covenants, it shall be lawful for the said of thee, the party of the second part, or its suctruste or successors, personally or by its attorneys or agents, to enter into or upon all and singular the premises hereby conveyed, or intended so to be and each and every part thereof, and wholly to evict the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said Plate Glass Company and appurtenances, conducting the business thereof, and enjoying the franchises pertaining thereto, etc."

It is also provided as follows:

"Article Fifth. In case default shall be made in the payment of the semi-annual instalments of interest of any of the said bonds according to the tenor of the said bonds, and the coupons accom-

panying the same, and in case any such default shall continue for a period of six months after demand by said trustee, in writing, for the payment of the said moneys, the principal of the bonds secured hereby, and the said accrued interest shall, at the election of the said trustee, become immediately collectable, from and out of the said mortgaged premises, anything in the said bonds, or herein contained, to the contrary notwithstanding, and the said trustee may thereupon immediately proceed to cause the said premises to be subjected to the payment of the said debt in like manner as hereinbefore provided."

Default as we have seen took place on the first day of July, 1895, and again on the first day of January, 1896, and the Trustee made demand in writing, for the payment of the money.

There was thus a failure on the part of the mortgagor company and of those taking under it to carry out the covenants and stipulations in the mortgage including the covenant or stipulation for the payment of interest; and on a continuance of such failure for six months after demand in writing by the Trustee for the performance of such covenants or stipulations the principal of all the bonds matured and the Trustee had a right to take possession of the property. Such right having matured the Trustee made its motion for a Receiver, but that motion was denied in consequence of the active opposition of the Penn Company and of its owner, this same man Kann, who was in possession of the mortgaged property as President and active executive officer of the Penn Company.

The duty of a Court to protect the subject-matter of a mortgage by insurance is too plain for argument, and protection of the property is the primary object of an equity Receivership.

In *Wallace* vs. *Loomis* (97 U S., 146), it was said that the power of a Court of equity to appoint

managing Receivers of corporate property is "a part of that jurisdiction, always exercised by the Court, *by which it is its duty* to protect and preserve the trust funds in its hands." And this language was repeated in *Quincy, etc., R. R. Co.* vs. *Humphreys*, 145 U. S., at p. 104.

THE TRUSTEE'S MOTION FOR A RECEIVER WAS EQUIVALENT TO AN ATTEMPT TO TAKE POSSESSION.

In *American Bridge Co.*, vs. *Heidelbach* (94 U. S., 798) the Court said:

"The mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a Receiver appointed, and possession delivered to him."

In *Allen et al.* vs. *Dallas & Wichita R. R. Co.* (3 Woods, 316), a railroad mortgage gave the Trustees the right to enter upon and take possession of the railroad company's property and operate it in default of the payment of interest. A default having been made, the Trustees filed their bill for foreclosure, instead of entering upon the property, and asked for the appointment of a Receiver. It was held that such default was a sufficient ground for the appointment of a Receiver upon the application of the Trustees, and that the Trustees were entitled to a receivership. The Court expressed the reasons for its decision most forcibly, and we accordingly quote the opinion at length:

"It remains to consider whether there was any necessity for the appointment of a Receiver, and whether, under all the circumstances as they now appear, a Receiver should have been appointed.

"In my judgment, independent of any necessity for the appointment of a Receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to

have a Receiver appointed to take possession of the trust property.

"The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage upon its property, are not be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee.

"In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal and interests of the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the Trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, *pro rata*, of the principal and interest due on the bonds. In short, it was made the duty of the trustees in the contingency named, to exercise the rights and perform the duties of Receivers appointed by the Court.

"These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. *They constituted a part of the consideration which the railroad company offered to purchasers of its bonds.*

*State of Maryland* vs. *The Northern Central R. W. Co.*, 18 Md , 183.
*Dunville* vs. *Ashbrook*, 3 Russ., 99 (3 Eng. Chy. Note C).

"A mere default in the payment of the debt is no ground for the appointment of a Receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents.

*Whitehead* vs. *Wooten*, 43 Miss., 523.
*Morrison* vs. *Buckner*, Hempst., 442.

"Are all these provisions of the deed of trust to

be disregarded? If not, are the rights of the bond holders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right and it was their duty to do, have applied to this Court to assist them in the execution of the trust whose duties they have assumed?

"These trustees might, as is sometimes done, have first taken possession of the trust property under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the Court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, *and it is the clear duty of the Court to give them all the rights conferred by the deed of trust.*

"By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession, the bondholders are in danger of losing their right to the income and profits

*American Bridge Co.* vs. *Heidelbach*, 94 U. S., 798.

"It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagor is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute.

* * *

"Regarding, therefore, only the terms of the trust deed, upon proof of a three months' default in the payment of the interest and upon a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it

would be the duty of the Court without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured."

In the case at bar the mortgage covered the rents, issues and profits. Had the Court appointed a Receiver, as prayed by the Trustee, those rents, issues and profits would have been collected by him and applied in part to the payment of insurance premiums. As it is, by the failure to appoint a Receiver, all the dangers alluded to in the above opinion have befallen the unfortunate bondholders, and the failure of the Court to appoint the Receiver *was due entirely to the action of the Penn Plate Glass Company and its organizer, Kann.*

Mr. Ferguson, put on the stand after Mr. Schoyer had been called on the complainant's behalf and had refused to testify (Rec., p. 439), described the events as follows:

"According to my recollection I received notice from Judge Buffington that he had concluded to deny the appointment of a receiver. According to my recollection it was the following day. I went into Court. *Mr. Schoyer* was there and *Mr. Kann* was there, and I said to the Court that in considering the motion for a Receiver it occurred to me that the Court had not considered the fact that this property was without insurance; that there was danger of fire; that my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage, and under the circumstances Judge Buffington said: 'I can't decide that question,' and intimated to them that if they were bound to insure they ought to protect us, and they denied they

were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimier was given to us in pursuance of my demand for insurance, and filed in Court, and is on file to day".

Of course, if the Court had appointed a receiver and taken possession at that time, its first duty would have been to see that the property was properly protected by insurance FOR THE BENEFIT OF WHOM IT MIGHT CONCERN. Whether the original mortgagor company, or the present owner, or Kann himself in his individual capacity, were personally bound to insure, were questions which were not at all pertinent in the proper consideration of the matters then before the Court. The Court had charge of a large and valuable piece of property. Its primary duty was to see that this property was preserved in the ordinary business way, that is to say, by proper insurance. It had before it as complainant and mortgagee, a Trustee *without funds* with which to buy insurance, but having a clear right to the application of the property's income in part to the purchase of such insurance. Who might own the proceeds of the sale of the property, or who would own the insurance moneys, which would stand in its place, in case it should burn while in the Court's custody, would be questions properly determinable later on in the case. But the *first* thing to do was to take possession of the property and protect it. For it must not be forgotten that at that very time the entire debt of the Mortgagor Company to the complainant as trustee had become due, being $250,000 of principal and several instalments of interest. The rights of the trustee were so vast and overwhelming that alongside of them no one else should have been considered for a moment.

When we look back upon it and consider the results that have followed this fundamental error, it seems difficult to understand how such

a mistake could have been made, still less that now, when all the parties are before the Court, the error can not be rectified. But here appears Kann again—the same malignant influence contesting vigorously the motion for a receiver. He, as has been shown, was the creditor who had originally, by his threats, compelled the old company to seek a receivership, and who, having purchased the property at a forced sale, was now president of the new company and as such in charge. He owned the company, but repudiated all obligation to pay anything,—interest, taxes or insurance. What he insisted upon was the right to continue in possession with all the beneficial results arising from possession, and with none of the corresponding burdens. Of course, it did not make a particle of difference whether the original mortgagor company or Mr. Kann or the new company were any or either of them under any personal obligation to insure. We shall show, we think, later on, that they were so bound by the express wording of the mortgage. But whether they were so bound or not, one thing was *certain*:—the complainant was entitled to have the property taken charge of by the Court and duly protected in order that its large matured debt should be paid.

Now, when the property remained in the hands of Kann through the inequitable denial of our receivership, what was the situation? He individually or as president of his new company was in possession. He had full knowledge of the complainant's claims. He knew all the facts—no one better. He ought to have been displaced by a receiver. He would have been displaced by a receiver if it had not been for his own conduct in opposition. The motion was denied because of his opposition. Still he was in possession and the property was insured. He himself had insured it for a very large amount for his own benefit. We care nothing

what name he used, whether he or his company was the nominal party insured, it is immaterial which. As the property stood in the name of the company this $450,000 of insurance stood in the company's name also. Kann and his company must be treated in fact *as receivers*, and just as a receiver's insurance would have inured to the benefit of whom it might concern, so must his insurance be held by a court of equity to have been taken for the benefit of the creditor trustee and the bondholders who furnished the plant which in fact made him and his company.

It must not be forgotten that this property and all these parties have been under the jurisdiction and protection of a Court of Equity ever since the original bill was filed in July, 1896. The denial of the motion for a receiver, the insurance effected by Kann, and the fire, have all occurred since that time. Kann had bought the property, subject to the mortgage of $250,000, for $37,500. When he organized the Penn Company and conveyed the property to such new organization, he named $83,500 as the value. Now he proposes to collect, as the result of this fire—this most fortunate accident—over $400,000. All the bondholders' insurance moneys will go to him. Judge Acheson, in his dissenting opinion (Rec., page 546), says that the highest figure for all the expenditures, given by Kann himself, is "about $185,000 to $200,000." and continues: "Now, if the larger of these "amounts is correct, the reversing decree here will "result in a *great money speculation* for the ap- "pellant company (the Penn Plate Glass) at the "expense of the innocent holders. But, in fact, "Kann's testimony, when scrutinized, discloses "that the bulk of the alleged expenditures was in "the purchase of additional ground (outside "the mortgaged premises) and in the erection "thereon of a water plant and a gas plant." (Rec., page 546).

Before we leave this branch of the case permit a hasty summary.

For an expenditure of less than $100,000 parties become the owners of a large piece of property, subject to a mortgage of $250,000 and interest. They absorb all the income and neglect all obligations under the mortgage. As a necessary result the entire principal and interest become due, and as a further necessary result, by the express terms of the mortgage, the trustee is entitled to take possession of the mortgage security personally or by a receiver. The trustee, having filed its bill for foreclosure, appeals to the court in the ordinary way for the enforcement of its rights and for the appointment of a receiver. This is opposed by the parties in opposition and the strange mistake is made by the court of permitting the defendants to remain in possession. They insure the property for some $450,000, a large overvaluation of the entire property, which scarcely can be considered worth $200,000 beyond the amount of the mortgage.

Then comes the fire, causing a total destruction of the property and leaving as security for the bondholders a small piece of land scarcely worth more than enough to pay costs and expenses. The Insurance Companies compromise the claims against them, being allowed a small reduction, and pay in some $400,000, which represents the entire loss. No reduction is made for the mortgage. *They pay the entire value of the destroyed property.*

But are the defendants entitled to collect this entire amount? There was a mortgage of over $250,000 on the property when it was destroyed. The bondholders had this interest in the property before the fire, a first lien; the defendants had simply an equity worth possibly $100,000 or a little more. The insurance covered the entire value. Did the fire in fact transfer this $250,000 of value

from the creditors to the debtors? Practically this is what the Appellate Court affirms.

No one will deny that the action of the Circuit Judge in refusing a receiver was error. But inasmuch as insurance was effected, and inasmuch as the insurance moneys have been paid, the Court is in a position to rectify the error without injury to anyone. The bondholders should not lose the amount of the mortgage debt. They simply will collect it out of the new form the property has taken. Is there not a remedy for such mistaken action as that of the Court below in refusing a receiver?

Is this fire in fact a huge profit on the part of these defendants—a most exceptionally fortunate burning—or will equity come in and say that some things must not be, that its protecting arms have been around this property, and the rights of these people have been subject to its sway ever since the commencement of the suit, ever since the trustee appealed to a court of equity for the enforcement of its rights, and that such being the case, the property being here, the parties being here, the proceeds of the insurance being here, equity will see to it that justice is done? Some inequities cannot be permitted to exist.

We will now pass to another view of the case. We now propose to show to the Court that in point of fact *the provisions of the mortgage* made it obligatory on the original mortgagor to keep the property insured for the benefit of the trustee (as, indeed, the original mortgagor admitted by so insuring) and that as these parties defendant now in possession really and actually stand in the shoes of those who made the original mortgage, the obligation to insure rests upon the defendants, and that the Circuit Court of Appeals erred in not

sustaining the action of the Circuit Court inrecognizing and enforciug such rights.

## SECOND

**The mortgage made it obligatory on the mortgagor company to insure for the benefit of the trustee, and by reason of its default, coupled with the trustees demand for possession, and the Penn Company's retention of possession, the trustee became entitled to an equitable lien on the Penn Company's insurance.**

The tenth article of the mortgage contains the following provision relating to insurance: (Rec. p. 38).

"It shall be no part of the duty of the party of the second part (the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty *to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance* or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

Plainly it is a recognition of an *obligation* on the part of the mortgagor, the other party to the agreement, to do certain things for the benefit of the bondholders, things which every bondholder would naturally insist must be done for his security. Somebody must record the mortgage and keep the property insured. The trustee has no money belonging to the trust and it cannot, therefore, be properly called upon to do these things which involve the expenditure of money. The bondholders cannot be expected to get together and furnish money for these expenditures. They are making an investment and are entitled to have the owner of the property on which the mortgage rests pay all the legitimate expenses. Moreover, practically considered, the holders of corporate bonds are generally too numerous and too scattered to be expected to act in concert or to attend to the protection of the property, the title to which is not in them. The owner of the property has all the trust funds and all the income arising therefrom, and very properly by entering into this agreement he contracts to do these things. By such contract the mortgagor company very materially increases the ease of negotiating its bonds, since it thus agrees to give the purchasers a protection to which they are entitled and which they will always be inclined to demand. It agrees that if by any oversight it fails in its duty in this behalf, the Trustee may require it to act.

It must not be forgotten that this agreement is accompanied by a number of other agreements everyone of which imposes upon the mortgagor an obligation which could not possibly be the obligation of any other person. How in the face of this fact can it be argued that the power given to the Trust Company to require insurance means anything but a promise on the mortgagor's part to

effect and preserve such insurance? Counsel may say that this provision does not arrive at the dignity of a "covenant". We are not concerned with the mere technical meaning of that word. Call this provision what you will,—covenant, agreement, stipulation,—it is none the less a contract which binds the mortgagor and imposes upon it an obligation from which it cannot escape.

The language of the District Judge on this subject is very clear and forcible (Rec. p. 496):

"There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, the Pennsylvania Plate Glass Company, in its mortgage, enumerated certain acts which the Trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilliug of such requisition upon itself it imposed it upon no one. Indeed, the nature of the acts which the trustee was empowered in its discretion to require, shows that they were such as the mortgagor would naturally perform.

"Thus the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are, therefore, of opinion that by the terms of the mortgage the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced

by the State Court during the receivership by its issue of Receiver's certificates for the purpose. These policies were in force when Kann purchased. The proofs show they were turned over to him and he was informed by the Receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months vesting a right of entry and possession in the Trustee, we next inquire what was the relation to this duty of a successor in the possession and title of the mortgagor to whom such possession was delivered and the equity of redemption conveyed by an order of Court and deed based thereon, in the terms set forth in the foregoing opinion on the original bill?"

The following is taken from the opinion of the dissenting Judge in the Court of Appeals (Rec. p. 540):

"It is very clear to me that by this clause a right was conferred upon the trustee in the interest and for the protection of the bondholders to require insurance against fire to be placed by the mortgagor upon the mortgaged property. The parties to this indenture were the mortgagor as party of the first part and the trustee as party of the second part. Now a contractual right in one of two parties to an instrument to require a thing to be done implies a contractual obligation upon the other party to do the required thing. Here the right given to the trustee to require insurance involved a correlative duty on the part of the mortgagor to effect such insurance."

The mortgage was originally made, as we have already stated, by the Pennsylvania Plate Glass Company. That corporation never questioned its obligation under the mortgage to keep the mortgaged premises insured for the benefit of the complainant and of the bondholders. Indeed from the very beginning of the trust it placed and kept alive insurance for their benefit. Even when it was

placed in the hands of a Receiver by the State Court of Westmoreland County, Pennsylvania, the same obligation was recognized and the same course pursued by the State Court's Receiver, Stoner, whom Kann's course as a creditor, forced the directors to have appointed March 19, 1904.

Stoner had been stockholder, director, secretary and treasurer of the Company since 1893, and was acting in these several capacities, with the exception only of treasurer, in December, 1893, and in the early part of 1894, when Kann became treasurer and the receivership commenced. As an officer of the Company Stoner was familiar with its business and knew the condition of the insurance which he had obtained on its plant. He also knew all about the mortgage. He knew that the Company had procured insurance for the benefit of the Trustee of the mortgage, and that when he became Receiver in March, 1894, there was about $200,000 of such insurance outstanding (Rec., pp. 418-419, 422). This insurance had three ~~years~~ and nine months to run, some even a little longer. Moreover after he became Receiver he himself as such took out insurance for the benefit of the mortgagee under order of the Court, Receiver's certificates amounting to four or five thousand dollars, being issued for the purpose of paying the premiums, so anxious was the Court to preserve the insurance which the mortgage required (Rec., pp. 418, 422). The insurance so taken out by Stoner ran for six months, more or less. In all these policies, both those taken out before and those taken out after the Receiver's appointment, the loss was made payable to the mortgage trustee for the benefit of the bondholders (Rec., p. 423). Kann—the creditor who had forced the company into the receivership—made no opposition to any of this. He had not then become the owner of the property in person, and it

was then to his interest to have the *status quo* preserved. These policies were outstanding at the date of the Receiver's sale, in June, 1894, when the property was sold to Kann, subject to the mortgage, the latter taking a deed July 2d, 1894 (Rec. p. 422). Later on they were allowed to expire (Rec. pp. 422-424). The fact is undisputed that Kann knew of them and deliberately allowed them to lapse.

The above being the attitude taken towards the insurance by the mortgagor company and its receiver and by the Westmoreland County Court, the records of that Court show that upwards of $330,000 of insurance procured through agents was allowed to lapse (Rec., p. 464). But Stoner, officer and receiver of the mortgagor company, and Kann knew both before and after the receivership, and long before any default in the payment of coupons, that the Trust Company was standing on the covenant in the mortgage, and was insisting on the keeping up of the insurance for the benefit of the mortgage (Rec., p. 426). And Stoner further says that it was because of this insistence of the Trustee that the Pennsylvania Company did keep up the insurance until it passed into the Receiver's hands, and that the Receiver himself pursued the same course (Rec., pp. 427, 465).

Of course when Kann took posession of the property in July, 1894, subject to the mortgage, he knew all about the insurance. Stoner had notified him (Rec. p. 425). Kann, it will be remembered, had become stockholder, director and treasurer of the mortgagor company in December, 1893, and January, 1894. He had also become a large creditor of the Company under circumstances of a peculiar nature, and presently, by his threats and proceedings against it, drove it into the hands of a Receiver, and deprived it of the power of continuing to carry out the insurance covenant. The

Receiver considered his own active duties at an end when he sold the property and deeded it to Kann. So that after July 2nd, 1894, when the mortgagor company's policies, and the policies of the Receiver for the mortgagee's benefit, had expired by their terms, there ceased to be any insurance in terms for the protection of the mortgage, and the insurance covenant was then violated by the *mortgagor* company. That violation still continues. Never since then has a dollar of insurance been taken out by the mortgagor company or the receiver, although, as we shall soon point out, the Trustee continued its former insistence upon the fulfilment of the covenant, and served written notice of that insistence on the *mortgagor* Company and the Receiver, as well as on Kann himself, the real party in interest, and on the defendant, the Penn Plate Glass Company.

Kann, once in possession, immediately took the ground that he would not insure for the benefit of the Trustee. He held the property personally for a year, from July 2, 1894, to July 1, 1895. As admitted in the answer to the supplemental bill, both he and his new Penn Company, organized by him, refused to insure for the benefit of the bondholders although requested so to do by the Trustee.

"They admit that long before the original bill was filed in the case, they gave distinct, repeated and written notices to the said plaintiff that they were not bound to insure the said premises for the benefit of the plaintiff, and that they would not nor would either of them insure the said premises for the benefit of the plaintiff as Trustee, and of the bondholders secured by the said mortgage * * *, and they admit that they did not preserve existing insurance or effect new insurances for the benefit of the bondholders secured by the said mortgage" (Rec., pp. 401–402).

This admission is coupled with the further

admission that both Kann and the Penn Company had full, actual and complete notice at the time of taking the property of all the provisions, covenants and stipulations of the mortgage including those relating to insurance.

*With the defaults above outlined in the performance of the insurance covenant of the mortgage in existence on the part of the MORTGAGOR COMPANY, the Receiver, W. L. Kann, and the Penn Plate Glass Company, the Trustee demanded in writing the performance of that covenant by all the above parties and thus availed itself of the right to "require the same to be done," expressly reserved to it in the mortgage.*

That demand was made by written notice dated November 29th, 1895, served by the Farmers' Loan and Trust Company, on Joseph W. Stoner, Receiver of the Pennsylvania Plate Glass Company; on Philip Semmer, President of the Pennsylvania Plate Glass Company; on W. L. Kann, personally, and on W. L. Kann, President of the Penn Plate Glass Company; (Rec., pp. 446 467).

Now, this being the state of affairs, and the parties above named persisting, in spite of the written demand, in violating the insurance covenant, and default in the payment of coupons having occurred, the Trust Company declared the principal of the bonds to be due, and filed its original bill to foreclose the mortgage. This bill was filed on the 8th day of July, 1896, *at which time more than six months had elapsed since the serving of the written demands for insurance as above stated at the end of November, 1895.*

Immediately upon the filing of the bill,—which prayed, among other things, that

"your orator may be placed in possession of the mortgaged premises personally, or that a Receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the said defendant the Pennsylvania Plate Glass Company, with power and authority to operate said plate glass works and carry out the business of said mortgagor company under the protection of this Court, with all the usual powers and duties of Receivers in such cases."

—the complainant made the motion for a Receiver, already described, filing with the Court as part of the motion papers the written demands for insurance referred to above. *The defendants Kann and the Penn Company being identical in interest were present by their attorney—the same attorney.* The motion was strenuously opposed by him on behalf of his clients, he appearing in this double capacity; and by reason of this opposition the motion was denied by the Court, on the ground that the Penn Company was solvent and able to take care of the property, a company in default in the payment of $250,000 of bonds and several instalments of interest, HAVING DELIBERATEEY DEFAULTED IN THE PAYMENT OF EACH INTEREST FROM THE VERY DAY WHEN THE TITLE TO THE PROPERTY WAS PLACED IN IT BY KANN.

The defendants filed a bond at the time of the receivership motion, by which it was agreed by the defendant Kann and by Mr. Wertheimer that if any obligation should be shown to exist on the part of the Penn Company to insure for the benefit of the mortgagee, the insurance taken out by *the Penn Company* should be applied to the payment thereof.

This bond clearly subjects the Penn Company's insurance to the lien of the mortgage if the Penn Company for any reason had become obligated to

insure for the benefit of the mortgagee. WE DO NOT DEEM THE BOND VERY MATERIAL, AS WE THINK THE EQUITABLE LIEN OF THE MORTGAGE ATTACHES TO THE PENN COMPANY'S INSURANCE WITHOUT REGARD TO ANY BOND. The agreement in question, however, still further subjects that insurance to the mortgage lien.

Nor is the *time* of the taking out of the Penn Company's policies immaterial. But even if it were material, there is no evidence in the case showing that Judge Buffington was wrong in his statement that a large part of the Penn Company's insurance was placed after the motion for a Receiver had been made. In any event the trustee's demands for insurance antedated the motion for a Receiver, the organization of the Penn Company, and the purchase of the property by it. Those demands continued throughout all the transactions, and no insurance was ever effected by the Penn Company until long after it had been repeatedly requested by the trustee to insure for its benefit, and had refused to do so.

Coming back now to the thread of our argument under this point, we have shown above, (1), a covenant or stipulation in the mortgage and by the mortgagor company to insure; (2), a provision in the mortgage that upon a breach of this covenant by the mortgagor and the continuance of the breach for six months after demand by the trustee for the performance of the covenant, the trustee could seize the property or foreclose the mortgage; (3), a breach of the covenant by the *mortgagor;* (4), a written demand by the trustee for the performance of the covenant; (5), a continuance of the breach for six months after that demand; (6), a similar demand ad-

dressed to the defendant Kann and the Penn Company who had bought the property subject to the mortgage for a nominal sum, and had been instrumental in producing the insolvency of the mortgagor company which resulted in the sale; (7), the bringing of a foreclosure suit by the Trust Company, praying to be put in possession personally, or through a Receiver; (8), an attempt by the trustee to take possession through a Receiver, based in large part upon the necessity for insurance; (9), the frustration of that attempt by the Penn Company, the purchaser subject to the mortgage under peculiar circumstances and for a nominal consideration, and the retention of the plant's income by it and the application of such income to the procurement of insurance, not in terms for the benefit of the trustee; (10), an agreement, given on behalf of the Penn Company in order *to prevent our possession*, undertaking to pay any obligation to insure for the benefit of the mortgagee which might be declared to exist out of the Penn Company's own insurance; (11), a subsequent destruction of the property by fire, while the trustee was being kept out of possession and was being obstructed in obtaining a decree of foreclosure and sale through defenses by *the Penn Company*, which defenses that company has now abandoned as untenable.

This argument does not in any sense rest upon a theory of *personal* or *individual* liability to pay the bonds or to perform the covenants on the part of the mortgagor company, or any one else; nor yet upon any theory of covenants running with the land. Should opposing counsel rest an argument on those points, whatever its merits or demerits, the argument can have no application to the present controversy. The above claim rests on the right accorded to the trustee by the mortgage to *foreclose or take possession* in case of a breach

of the covenant by the mortgagor, who *has* broken it. It rests on the right of the trustee to enforce the *lien* of the mortgage for such a breach of the covenant; and our contention is that under the circumstances outlined above, the property having been destroyed, the *lien* of the mortgage *is* capable of enforcement against, and must be impressed upon, the insurance fund, substituted for the lost property.

## THIRD.

### The History of the Destruction of the old Company and the Organization of the new discloses Circumstances which make it inequitable for the Defendants to receive the insurance as against the Mortgagee.

We come now to another view of the case under the supplemental bill. There is, in fact, an identity of interest in the parties with whom we are dealing which equity will recognize. The old Pennsylvania Plate Glass Company was apparently a solvent concern, fulfilling its duties under the mortgage until its officers met the defendant William L. Kann. After making himself owner of its property under the circumstances already recounted he proceeded to organize the Penn Plate Glass Company, and to hold the property. But no Court of Equity can fail to see the true situation. It is Kann and no one else who is fighting for this insurance money to-day, whether he appears in the name of the defaulting corporation or in his own name.

Our contention does not rest upon any theory of covenants running with the land.

Whatever would have been the effect of the covenant as to insurance if *strangers* not cognizant of the facts had purchased the property at the Receiver's sale, we assert that under the existing circumstances, Kann and the Penn Company stand in the place and stead of the Mortgagor Company itself, and must be held bound by the covenant to insure, not perhaps to the extent of being obliged to respond in a court of law, but surely a court of equity which has these insurance funds in its hands.

We have already shown that the old company and its Receiver recognized and fulfilled the obligation to insure the property, and that when Kann bought in June, 1894, insurance existed to his knowledge for a large amount in favor of the trustee, which he allowed to lapse.

But even before that date, and in 1893, Kann had become associated with the Pennsylvania Company. We call the Court's especial attention to Kann's own testimony before he knew how it might be used against him. He was called by the defendants under the original bill *before the fire occurred*, and gave the following testimony about his connection with the original company. He was first approached, he says, in the early part of 1893 by Mr. Semmer, who was largely interested in the company (Rec., p. 359). He then had made no loans to the company (*Ib.*). But in December of that year he became its creditor by lending it money, and, in fact, discounting for it a note of $3,500 (*Ib.*, pp. 353-359). Prior to the making of this loan, as he testifies, he was handed a statement by the officers of the company purporting to show their financial condition (*Ib.*, p. 353). This statement, together with other statements made by the officers at about the same time, purporting to

show that the company was in a flourishing condition and was making money notwithstanding a prolonged strike and notwithstanding the additional fact that the panic of 1893 was affecting all business, was what induced Mr. Kann, as he testifies, to advance money in November, 1893, and to "become interested in the company" (*Ib.*, p. 354). On the strength of that statement he declares he "became interested in the company" (*Ib.*, p. 354), "*agreeing to identify*" himself with it (*Ib.*, p. 359), and was elected an officer (*Ib.*, p. 354), director and treasurer of the Company. "I accepted the position," he says, "predicated on that statement in open meeting that if that statement was true, and they could substantiate it, that I would accept the position which they had elected me to—as treasurer of the Company, and if, upon examination of their books, which I asked ten days' time to do, if the examination proved that that was true, I would accept it" (*Ib.*, p. 354).

The election took place January 10th, 1894, and, as he testifies, he accepted the position with the understanding above set forth (*Ib.*, p. 360). Two days from his election, on January 12th, 1894, he went to Irwin, where the works were, and proceeded to investigate the books of the Company, with every opportunity given him to examine them (*Ib.*, p. 360). *He found that the Company was not solvent*; on the contrary, that it was, and always had been, insolvent. He says: "*At that time* I had evidence that they had always been so from the inception of their business" (*Ib.*, p. 357). The deficiency, according to him, amounted to upwards of $119,000 (*Ib.*, 357). Immediately, on the same day, January 12th, he tendered his resignation, as he says (*Ib.*, p. 360). The Executive Committee was called at his instance on that day (*Ib.*), but somehow he didn't get his resignation accepted, and was still holding over as treas-

urer of the Company on March 15th, 1894 (*Ib.*, p. 361).

It may perhaps be considered surprising that this man who had been so uneasy about becoming connected with the company, which he now knew to be absolutely insolvent, should have continued to hold over as treasurer after his discovery of the insolvency, from January 12th until March 15th—two entire months. It must be remembered that at that time his loans to the company were quite small, a few thousand dollars at the most; and if he is to be believed, his holding of the company's stock consisted of a single share, transferred to him by Cowen or Semmer, for which he never paid (*Ib.*, p. 359). So that he could have had no *personal* reason for holding over, no necessity to stay there for *the protection of his own interests.* Of these circumstances he makes two explanations, widely different from each other, and both very odd, to say the least. The first is that he held over under protest, because the officers of the company claimed "that they had then an offer to sell out one-third of the controlling interest in that plant for a very large sum of money, and they pressed me to take no arbitrary steps until they could consummate that, when they would relieve me of the position and pay me back the money which I had advanced" (*Ib.*, p. 354). This explanation throws an interesting light on his ideas as to business propriety. According to the above statement, which is in his own words, knowing that this company was hopelessly insolvent, and had been so from the beginning, he was nevertheless willing to aid those interested in it in foisting one-third of the controlling interest in the plant on *somebody* "for a large sum of money." To assure the success of this nefarious scheme, he wants us to undrstand that he was willing to re-

main treasurer of the insolvent corporation for a while.

His other explanation is so weak that we are led to realize the trouble he was in to explain his strange connection with a company which he claimed to be insolvent. And perhaps we may be able later on to point out who the *somebody* was with whom the negotiations were pending. Meanwhile, we will have to be content with this explanation of his holding over, unless, indeed, we adopt the second, which is to the effect that the directors were having great difficulty in getting a meeting because they were in such straits "that you couldn't get them together" (*Ib.*, pp. 360, 361).

Be these matters as they may, Kann, by his own testimony, remained treasurer of the company two months after he knew that it was and always had been insolvent. Now, did he, as one would naturally suppose, *cease* lending money to this insolvent concern from which he was so eager to get loose, and in which he had so little capital invested? Not at all. He actually proceeded to advance them "further moneys in January and February, 1894" (*Ib.*, p. 353), and lent them altogether "$42,500 between December and February" (*Ib.*, p. 359). This was certainly very extraordinary and would, indeed, seem foolhardy but for the fact that Mr. Kann, being apparently a very shrewd business man, who saw far ahead, was careful to take security for his loans. With the exception of the discount of the $3,500 note, with which he had opened his account with the company, the $42,500 loaned by him was, as he testifies, "in cash, on promise to deliver to me, and they did deliver to me, judgment notes of the company" (*Ib.*, p. 359).

But, somehow or other, the company, although insolvent, seems to have held its own, and we do

not find that any other creditors were pressing it for payment. But Kann resorted to severe measures. The company was evidently at his mercy, so its directors authorized the commencement of a suit to wind up its affairs. In this suit in the Westmoreland County Court the company went into the hands of Joseph W. Stoner, as Receiver, in March, 1894 (*Ib.*, p. 354). In June, 1894, the Receiver, by the order of the Court, sold the property subject to the mortgage, and Kann bought in the property, as has been stated, subject to the existing mortgage of $250,000 for $37,500, bidding it up against other bidders, and outbidding the highest bidder by $500, thus showing that he was very desirous of getting the property. He had at this time reduced his claims against the company largely to judgments. He thinks he had a judgment for the whole amount, but as to the actual amount of the judgment he is not quite sure (*Ib.*, p. 361).

It was pretty quick work. In December Kann made his first advance of $3,500. In January he discovered the insolvency, but nevertheless advanced more. In February he enforced his securities. In March the Receiver was appointed and in June Kann was the owner of the property.

After the supplemental bill was filed, Semmer was recalled by the complainants and closely examined as to these transactions.

Semmer showed that he had personally been connected with the mortgagor company in various capacities from the beginning, and was president in 1893 and 1894. He first became acquainted with Kann in the fall of 1893, and in the beginning of 1894 Kann was elected director and treasurer (Rec., p. 411). This election was held on January 10th, 1894 (Rec., p. 413). Before Kann became director and treasurer, Semmer says, there was an agreement entered into between Kann and some of the

stockholders a verbal agreement. These stockholders were represented by Semmer and Cowen. Semmer practically handled the entire negotiations (Rec., pp. 411-412), which were held in the latter part of 1893 at New York, Irwin and Pittsburgh (*Ib.*, p. 412). These stockholders, it seems, were very hard pressed for money. The panic was on, and they were looking for somebody to provide additional funds. Kann appeared with an evident desire to go into the Plate Glass business (*Ib.*, p. 412), and they finally entered into an agreement with him to give him one-third of the controlling stock provided he would furnish the company with the needed money—$100,000 was needed, certainly—and he agreed to furnish this money provided that Semmer and Cowen would assign to him one-third of their joint holdings of the controlling stock interest (*Ib.*, p. 412). With this testimony before us we begin to find out who the *somebody* was who, as Kann had tes ified, was negotiating for one-third of the controlling interest, and *because of whose negotiations he, Kann, consented to continue treasurer of the company, although he knew it was insolvent.*

Carrying out the agreement, Cowen and Semmer transferred to Kann one-third of the controlling interest, amounting to $86,000 in stock (*Ib.*, 412), and the actual stubs of the certificates so transferred and the record of the transfers on January 19th, 1894, may be seen in the exhibits offered by us on pages 441-442 of the Record. It is interesting to compare this proof with Kann's own statement already recited that he never had but *one* share in this corporation. Kann also acted in pursuance of the agreement between himself and Cowen and Semmer. He accepted "the directorship and financial management" at the annual election (Rec., p. 413) in January, 1894, and advanced some $38,500 in the first six weeks of his connection (*Ib.*, p. 413).

*None of this was advanced before he was elected* (*Ib*). This is in strict accord with Kann's own testimony already quoted, and it will be recalled that within two days after his election, and consequently before he made these advances, as he admitted, he knew the company was insolvent.

Now, these amounts were advanced by Kann on the understanding that he was to endorse with Semmer the company's notes, receiving by way of protection judgment notes from the company. He obtained *an option from the company on the unsold preferred stock*, amounting to about $106,000, and the understanding was that, when he had paid for this stock, the proceeds of such sale should be used to pay the notes as endorsed (*Ib.*, pp. 413-414). Under this arrangement a judgment note for $10,000 was issued to Kann, but judgment notes were refused him as to the balance of the $38,500, because, after advancing that much, *he declined to advance any more, unless Cowen and Semmer would assign to him the balance of their stock* (*Ib.*, p. 414). Thus Kann was gradually seeking to get absolute control of the company. A treasurer and director, with one-third of the controlling interest in the stock in hand, with an option on $100,000 preferred stock, with a judgment note for $10,000, and other claims amounting to $36,500, and with the company insolvent and in dire need of money, he expected to be able to force these parties to hand over to him the balance of the controlling stock. This extraordinary demand was made within three or four weeks after January 10th, 1894 (Rec., p. 414).

Upon the refusal of Cowen and Semmer to comply with this demand, Kann entered his $10,000 judgment note (*Ib.*, p. 415). The sheriff took possession on March 14th, and the directors of the company hastened to call a meeting, when it was decided that the only thing to be done was to have

a Receiver appointed. The application to the Westmoreland Court for a Receiver was accordingly made. This followed immediately the entry of Kann's $10,000 judgment note. The application would never have been made but for that. "Otherwise the company was in no immediate stress, excepting the pressure brought on by Mr. Kann," says Semmer (Rec., p. 415). After the Receiver was appointed, Kann brought suit for the balance of the $38,600 not represented by judgment notes, seeking to reach the remaining moneys in the hands of the Receiver. *He attached, moreover, $15,000 or $16,000 of the company's money in New York, its money in the hands of its selling agent, Hutkoff, and its money in the People's Bank* (*Ib.*, pp. 415-416).

This, with Kann's own testimony already quoted, forms complete proof of the allegations of the supplemental bill as to Kann's proceedings in connection with the mortgagor company, which resulted in the wrecking of that company, the depriving it of its property, the prevention of the fulfillment of its covenants and obligations and the transfer of its property to himself. That he laid his plans and proceeded with a view to obtaining control of the property in one way or another, is beyond question in view of the evidence. Failing to get possession by means of a controlling interest in the stock, he had recourse to other and more drastic measures which but await the decision of this Court to be deservedly defeated.

Kann's counsel subjected Semmer to a vigorous cross-examination, but did not succeed in shaking his testimony. The cross-examination will be found on pages 443 to 463 of the Record. On this cross-examination Mr. Semmer testified that his arrangement with Kann was a private matter, of which the mortgagor company had only partial

notice (Rec., pp. 443-445). Mr. Schoyer again referred to the statement (Ex. No. 21) already mentioned by Kann, whereby, as defendants allege, an actual loss of $119,000 was changed to an apparent profit of $25,000, and cross-examined Semmer with a view to showing that, as Kann had testified, this statement had been shown him by Semmer at the time he, Kann, became connected with the company (Rec., pp 448 450). We may say in passing, that this much talked of statement was a very harmless affair after all, and that the theory upon which it was drawn was proved to be perfectly accurate by the witness Marthens (Rec., Vol. 1, pp. 330-332). But whether such statement was presented or not, and whether it had the effect ascribed to it or not, the fact remains that after the 10th of January Kann had full access to the books and learned that the company was insolvent, and nevertheless continued to act as treasurer and director (from which offices he has never to this day been relieved) and to advance moneys in the sum of $38,500.

One thing brought out by the cross-examination of Semmer was a proposition made by Kann after his original agreement with Semmer and Cowen, at Mr. Schoyer's office, by which the control of the company was to be placed in the hands of Kann at once in consideration of further advances by him. Mr. Schoyer's understanding of that proposition is set forth in the form of a question on page 453 of the Record. Semmer, however, testified that he flatly refused to accept that proposition because it was altogether one-sided—that by it Kann was to get every advantage, and Semmer and Cowen practically nothing (Rec., pp. 454-457). "Mr. Kann," says Semmer, "kept threatening to close us up unless we would assign him the entire controlling interest of the concern" (*Ib.*, p. 455). "Our directors never held a meeting for the purpose of

having a Receiver appointed until Mr. Kann had entered judgment " (*Ib.*, p. 463).

Now, *after Kann had heard the above testimony and for the purpose of rebutting it, he himself was called by the respondents and gave more testimony.* His former testimony, already summarized by us, will be remembered in connection with this. He reiterates his election as treasurer on January 10th, 1894, and his continuance in that office " under protest " until March, when the property passed into the Receiver's hands (Rec. p. 472); also the fact that he examined the books and learned of the company's insolvency within a few days after his election (*Ib.*, p. 473). On page 474 he says: "The only arrangements I ever had to advance any money was after I became or took the position of treasurer." This, as we have seen, differs somewhat from the facts as testified to by Semmer, *and as testified to by Kann himself on his former examination*, when he showed that his advances had begun in December, 1893. But it is another strong announcement of the fact that the bulk of his advances were made *after* he became treasurer—that is, after he knew that the company was insolvent. He admits having received the $10,000 judgment note (Rec., p. 474). The amount of his advances is again fixed at $38,000, exclusive of the note for $3,500, which he had discounted before he became treasurer (*Ib.*, p. 475). He then states the proceedings which resulted in his entering judgment against the company on March 15th, 1894, and the appointment of a Receiver on the 19th of that month (*Ib.* p. 475). He obtained judgment for the rest of his claim (*Ib.*, p. 475). which was entered as of March, 16th, 1894 (*Ib.*) —and was largely satisfied, as Stoner's testimony will show, out of property of the mortgagor company other than the mortgaged property—and he

bid in the property at the Receivers's sale in June for $37,500 (p. 476). When asked by Mr. Schoyer about the statements of Semmer concerning the arrangement with Kann to advance $100,000, Kann was very careful in framing his denial of the truth of those statements. Read his denials (Rec., pp. 476-477), and it will be seen that he only denies that arrangements to advance moneys were made "*preliminarily*"—"*before he got a resolution of* "*the executive board of the company to give him* "*judgment notes*"—which was in early January, 1894. His denials at this point amounted to no more than a declaration that he had been smart enough to make no advances—no promises of advances—until he got a resolution of the company to give him *judgment* notes. What he was aiming at was the security. He says that he undertook to "accept their proposition" (that is, Semmer and Cowen's proposition), if his examination of the books showed that the Company was solvent (Rec., p. 476). He found that the Company was *not* solvent, nevertheless, apparently, he *did* accept their proposition, for he went ahead and advanced $38,500, getting a judgment note for $10,000 of the same. "They were hopelessly and totally insolvent," he says on the 1st of January, 1894 (Rec., p. 477).

On pages 477 and 479 he offers an explanation of the transfer of stock to him from Semmer and Cowen, which, according to him, was effected under the arrangement at Mr. Schoyer's office in February, 1894—the one referred to by Semmer as utterly one-sided in favor of Kann and which Semmer says was declined altogether. The preceding arrangement Kann denies. He says the arrangement of February, 1894, fell through, and that, *while he holds the stock*, he holds it only as a portion of the company's records (Rec., p. 478). It was stock formerly belonging to Cowen and Semmer, transferred to Kann under one arrangement or

another, and yet Kann says here that he holds it *for the company*. What has the *company* to do with it? The truth is, Kann is trying here to explain his *possession of this stock*, although, as he states, the arrangement fell through. It makes no difference to us whether the agreement between Kann and Semmer, by which Kann got this stock and advanced moneys, was made before or after he was elected treasurer—at Mr. Schoyer's office or out of it—the *fact* upon which we rely and which is proved by Semmer, by Kann and by all the evidence, is that Kann *did* contract in the beginning of 1894, when he knew the company was insolvent, and when he was becoming a large creditor of the company, to get a controlling interest in the stock, and to obtain judgment notes of the company. The Court will draw its own inferences from his first allegation that he never held but one share of stock, and his subsequent admission in view of the tell-tale stubs that he held one-third of the entire issue, and from other inconsistencies between his first and second explanations.

Of course Mr. Kann was given an opportunity to deny specifically and *seriatim* the various charges brought against him in connection with his proceedings at this time (Rec., pp. 479-482). His denials will have to be taken for what they are worth, and in comparison with the rest of the evidence.

Cross examined as to why Semmer had refused to sign any more judgment notes after the first $10,000, Kann could only say that Semmer wouldn't sign—said he wouldn't (Rec., p. 483). Is this more probable than the clear explanation of his own refusal given by Semmer himself?

Cross-examined as to the issue of the certificates transferred to him by Cowen and Semmer, Kann showed that the stock books were at his own office; that the certificates were in the handwriting

of his own bookkeeper (p. 483). The balance of the cross-examination will be found on pages 485–489 of the Record, and we refer the Court to it *in extenso*.

We must also leave the Court to refer to the Record for the testimony of Stoner, corroborating some of the above facts surrounding Kann's acquisition of the property (Rec., pp. 419–437) We have already devoted too much space to the discussion of a phase of the case which the evidence leaves without a doubt—the relations of Kann to the old company. That he wrecked that company and obtained its property at a nominal price and in pursuance of a scheme laid out from the beginning, is proved as surely as anything ever was proved. We will now proceed to show that the Penn Company is merely another name for Kann.

If no other proof of this were in the case, it would be sufficient to point to the consideration named in the deed to the Penn Company—$83,500, consisting, as Kann himself testifies (Rec., p 362), of "just exactly what it cost" him; * * * "that is" (he says) "the $37,500, six per cent. interest added on to the purchase money up to the time, plus the improvements which I had made and paid for, they assuming * * * the unpaid portion of those contracts not paid for yet on the improvements, less $10,000."

But there is abundant proof of the identity of the Penn Company with Kann, in his own testimony.

"*I subsequently formed a corporation* known as the Penn Plate Glass Company and sold them the property" (Kann's testimony, Rec., p. 355).

This company, it seems, he himself "organized" about a year after he had bought the property, and he "turned over" the property to it (Rec., Vol. I, p. 361), and has "managed that

plant ever since it has been operated * * * since it has been a corporation." He is "now president and manager of that company" (Rec., pp. 358-359).

Mr. Stoner's testimony also proves the identity of Kann and the Penn Company. Kann divulged to him his intention of organizing the company about six months after he had bought it (Rec., p. 425). Kann was a charter member, and so were all his friends—Dreyfus, Rosenthal, Kerr, Wertheimer and Stoner (*Ib.*, p, 526), the latter of whom became a charter member at the solicitation of the others, and took ten shares of the stock (*Ib.*, pp. 425-426). He subsequently parted with them, but at a price which he refused to state (*Ib.*, p. 436).

Another proof of the identity of Kann with the Penn Company is the fact that he so vigorously defended his suit. Having parted with the property, and been paid, as he declares, all he disbursed upon it while in personal possession, there could be no good reason for him to join in defense of the Penn Company unless his interests in the latter were so great as practically to identify him with it. Moreover, he, together with Mr. Wertheimer, went upon the insurance bond filed in this case whereby he obligates *himself* to pay the insurance (if the Court so decides) out of the *Penn Company's insurance* Indeed, it is unnecessary to continue calling attention to the numerous proofs of the Penn Company's identity with Kann, and we shall now simply assume that it has been proved by the whole course and conduct of this suit, and shall proceed to discuss, in conclusion, a few principles of law which we think bear upon the relief prayed for in the Supplemental Bill.

We contend that there is an irrebuttable presumption that the insurance which has been effected to the Penn Plate Glass Company extends to and covers the interests of the trustee.

"It is a fundamental principle that equity imputes an intention to fulfill an obligation. The meaning of this is that when one acquires an interest in property and is under some obligation in respect thereto to another, though in acquiring the same he expressed no intention of fulfilling the obligation, equity will impute such an intention and will erect an equitable estate or interest in the subject-matter in favor of the person to whom the obligation is owing."

Beach on Modern Eq. Juris., §24.

The complainant has no adequate remedy at law for the procurement of the relief to which it is plainly entitled. The provisions of the mortgage, when taken in connection with the manner in which the property has been acquired by the defendant, the Penn Plate Glass Company, create an implied contract, enforceable in equity, on the part of the Penn Plate Glass Company, to insure for the benefit of the bondholders and the trustee. The insurance which has actually been effected by the Penn Plate Glass Company, in whatever terms the policies may be couched, must be presumed by a Court of equity to have been in fulfillment of this obligation. And in view of the accident which has wiped out so large a part of the mortgage security, it would be a violation of good conscience for the Penn Plate Glass Company to retain the full benefit of the policies obtained by it. The trustees and bondholders should therefore be decreed in equity to have a lien upon those policies to the extent of their loss.

It does not meet our contentions for the appellant to say that the plaintiff and the bondholders had insurable interests in the property, which they might have covered by effecting insurance themselves; and that, in a suit at law upon the covenant, the damages, if any, would have been simply the cost of the insurance. This is not a suit at

law, but a bill in equity, filed after the loss of the property, at a time when the insurance could not be effected by the trustee, which, moreover, *never was in possession of any funds* which it might have used to effect insurance, and the mortgage never contemplated that it would be.

We are not arguing in this point that the covenant of the mortgagor to insure for our benefit is binding upon an innocent stranger purchasing the mortgaged property. We think the facts set forth in the supplemental bill and proved by the evidence demonstrate that the present owner of this plant, the Penn Plate Glass Company, is not an innocent owner of this property, but became such owner under circumstances which estop it from denying its obligations to insure for the benefit of the bondholders, and render it inequitable that it should retain the whole benefit of the insurance effected by it upon the destroyed property. It would be a miscarriage of justice if such a man as the defendant Kann could with impunity, upon becoming the owner of mortgaged property by the methods pursued in this case, permit the existing insurance of the mortgagee's interest to die out, and, by reorganizing the company, and issuing new insurance in a new name, deprive the mortgagee altogether of the benefit of insurance—and this, particularly, when the loss has occurred during a protracted period of obstruction by him and his reorganized company of the mortgagee's matured right to possession of the property and a sale under foreclosure. It must not be forgotten that the principal as well as the interest upon these bonds is now due, *and has been due since the beginning of 1896*, and that the fire occurring in April of 1898 destroyed property which was *already* subjected to a *matured* mortgage debt of nearly three hundred thousand dollars, and against which the lien of the mortgagee was in process of enforce-

ment. As early as 1896 the trustee had asked the Court to take possession of the property through a Receiver. These facts are of extreme importance. It is not as if the trustee were here asking a Court of *law* to fix the obligation of this insurance covenant upon a purchaser—even such a purchaser as the Penn Company—at a time when nothing was due under the mortgage, and before a fire had occurred, and before the lien of the mortgage had matured and was in process of enforcement. *For all equitable purposes the mortgagee was the owner of the property at the time when it was destroyed.* The title, of course, remained in the Penn Company, and would remain there until a deed under a foreclosure sale. Indeed, the title would never vest in the mortgagee unless it saw fit to purchase at the sale. But its right, to the extent of the mortgage debt, to every dollar of *value* in the property up to the extent of its mortgage had accrued and was matured at the time of the first default. Its right to a sale matured months before the destruction of the property, and every dollar of the proceeds of sale, representing the *value* of the property, would have belonged to the mortgagee up to the amount of the mortgage debt.

The fact that a *decree* had not yet been entered cannot alter these facts. A decree does not *create* the rights of the mortgagee, it only declares them. Its effect is simply to *execute* the contract of the parties, and to enforce their several rights as they already exist. Hence, looked at from any point of view, it is impossible for the defendants to deny that the property, from the destruction of which they expect to reap such benefits in the collection of insurance, was, so far as its *value* was concerned, the property of the complainant. It is no answer to this to say that the insurance was only intended to cover the defendant's *equity* in the property.

In the first place, the respondents are not proceeding on that theory, *because they are collecting the value, not of such equity as they may have,* BUT OF THE ENTIRE DESTROYED PROPERTY. And in the next place, it must be remembered that long before the fire occurred the defendants had, in equity, as between them and the mortgagee, ceased to have any insurable interest in the property, or indeed any interest in it whatever. We cannot insist too earnestly on this point. When the defaults occurred under the mortgage, and the trustees' right to a sale of the property matured, the mortgagor immediately ceased to have any tangible interest in this property *as against the mortgagee.* The entry of a decree would add nothing to the basic rights of the parties. And when it is further remembered that a decree would have been entered as far back as 1896 *but for the obstructive defenses interposed by the defendants Kann and the Penn Company, which they have now abandoned,* we submit, the Court should not hesitate judicially to impress the lien of the mortgage upon whatever insurance that company is entitled to. If this is not done, the Penn Company, by reason of its own unwarrantable obstruction of the foreclosure suit, will be able to collect from the insurance companies the *full value,* not simply of an equity of redemption, but of the entire destroyed property, which of right should belong to the mortgagee. But, if that obstructive defense had not been interposed, and if the foreclosure sale had preceded the fire, as it would have done but for that defense, will it be seriously contended that the equity of the Penn Company would have been worth the amount collected on the insurance, or anything like it? That Company bought subject to the mortgage with full notice of the mortgage, and is equitably entitled to obtain nothing out of the mortgaged property until after the mortgage debt

is satisfied. If, therefore, this Court sustains the defense, the Penn Company will *profit* by the fire and become unjustly enriched at the expense of the mortgagee.

The defendants assert that we must point to some contract, express or implied. There is no magic in these terms. A contract implied in law is really no contract at all. It is simply an instance of the operation of the law to prevent the working of a manifest injustice within the forms of law. In certain cases the law will compel a man to perform a duty by implying a promise on his part to perform it. One of the classes of implied contracts is well described by Lord MANSFIELD in *Moses* vs. *MacFarlen* (2 Burr, 1008), where he says:

"If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded in the equity of the plaintiff's case, as it were, upon a contract—*quasi ex contractu*, as the Roman law expresses it."

The instances in which contracts are implied in law are too multitudinous to cite.

"Whenever circumstanres arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

*Ex parte Ford* (16 Q. B. D., 307).

The equitable foundation of implied contracts is clearly expressed by Pothier in writing upon such contracts in the civil law, from which we derive the principle.

"In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity, produces the obligation

by rendering obligatory the *fact* from which it results Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations *in the same manner as* actual contracts."

Pothier on Obligations, 113.

These authorities indicate the basis upon which is built the broad doctrine of implied contracts. Like constructive trusts, they necessarily depend on the circumstances of each case, and vary as infinitely as the transactions of men. If, then, it is necessary, in order to sustain the equitable lien of this complaint, to have some underlying *contractual* obligation, the facts in the case create a situation from which natural equity compels the implication of a *promise* on the defendants' part to hold a part of these insurance moneys *in trust* for the complainant, and to pay over the same upon the adjustment of its loss.

"That a case is novel, and not clearly within the limits of any adjudged case, does not warrant the denial of relief in equity."

Beach on Modern Equity Jurisprudence, § 1.

And in the case cited in the foot notes by Mr. Beach, p. 2, *Piper* vs. *Hoard* (107 N. Y., 73), the Court says, referring to the facts then before it:

"If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a Court in a civilized land in behalf of the perpetrator of the fraud."

From the above considerations it will be seen

that this bill is not filed upon the narrow contention that the covenant to insure runs with the land. We are not concerned with *that question*. What we do claim is that with this covenant in the mortgage; with the insurance placed by the original company in pursuance of that covenant for the mortgagee's benefit; with Kann identifying himself with the mortgagor company and bringing it to speedy destruction; with the new company nothing but another name for Kann and his interests, and taking the property with full notice of his dealings; with both these parties fully aware of the mortgage, and of its contents, refusing to insure for the trustee's benefit, and deliberately permitting the former insurance to lapse, in spite of the demands of the trustee; finally, with these same parties improperly opposing our settled right to be put in possession through a Receiver, and also obstructing the foreclosure, so that the fire occurred before a decree could be entered, but long after the trustee's rights had matured, and while the mortgage lien was in process of enforcement—with all these facts, we have made out a claim to the insurance effected by the Penn Company without regard to whether that company *intended* that insurance to inure to the benefit of the mortgagee or not.

The ground of our claim is the equitable obligation of the defendants, growing out of their dealings with this property, and it does not in any sense rest upon the *intention* of the Penn Company or Kann. In this connection, we call attention to the argument advanced by the defendants below, that even insurance effected by the *mortgagor* company would not be subject to a lien in favor of the mortgagee, although the mortgage contained a covenant to insure for the mortgagee's benefit, provided the insurance policy contained evidence that it was *not* the intention of the mortgagor to take

out that policy in pursuance of the covenant. The case of *Dunlop* vs. *Avery* (89 N. Y., 502), is cited in support of that argument. But that case does not support it. The Court, on this point, says in the course of its opinion:

"The rule that when the mortgagor covenants to keep the buildings insured for the benefit of the mortgagee, that any insurance that may be effected *in the mortgagor's own name or for the benefit of the mortgagor* will be presumed to be in fulfillment of the covenant is well established, *but this presumption arises only in the absence of proof to the contrary*, and this is not the legal presumption when the policy itself provides for the payment of the loss to *another* incumbrancer."

The defendants understand this to mean that the presence of proof that the insurance was intended by the mortgagor to cover only his *own* interest, *defeats* the presumption of law whereby the insurance is taken to be for the benefit of the mortgagee and a lien in the latter's favor is impressed upon it.

But a moment's reflection will show that that cannot be the meaning of the Court. In the first place, the *Avery* case was a fight between *two incumbrancers*—not between an *incumbrancer* and the *mortgagor*—in which the senior incumbrancer was seeking to wrest from the junior, insurance which the *mortgagor* had effected—not in its *own* name—but in the name of the *junior* incumbrancer. The mortgagor was under covenant to both incumbrancers to insure for their benefit, and it would clearly have been inequitable to give to the first incumbrancer insurance which was in terms the property of the second. That is what the Court held, declining to indulge the presumption above referred to "when the policy itself provides for the payment of the loss to *another incumbrancer*." The Court does not say that the presumption would not be indulged if the policy

provided for the payment of the loss to *the mortgagor*. On the contrary, that is the precise case in which the Court says the presumption *does* hold. The rule is well established, it says, when the insurance is effected "in the *mortgagor's* own name, or for the benefit of the *mortgagor*." And this must, undoubtedly, be the rule; for, otherwise. it would be meaningless. There never would be a case in which the mortgagor could not adduce evidence that he intended the insurance to be for his *own* benefit, and not for the benefit of the mortgagee. The foundation for the rule is that *equity* requires such insurance to be impressed with a lien in favor of the *mortgagee*. The *Avery* case refers to and rests upon the case of *Cromwell* vs. *The Brooklyn Fire Insurance Company*, 44 N. Y., 42, in which the Court, alluding to this old established doctrine, says (p. 47):

"Where the assured has agreed to insure for the protection and indemnity of another person having an interest in the subject of the insurance, then such third person has an *equitable lien*, in case of loss, upon the money due upon the policy to the extent of such interest. These are principles of law well settled."

To claim, as the appellant claims, that the mortgagor can escape from the effect of this equitable lien by simply declaring that the insurance is limited to his *own* interest, is to deprive the rule of all efficacy--indeed, to do away with it altogether, and to permit the mortgagor to destroy the obligation imposed by equity upon him simply by denying the existence of that obligation.

In *Wattengel* v. *Schultz* (11 Misc., 165), which, like the present case, was a foreclosure suit, a mortgage contained a covenant to insure and to assign the policies to the mortgagee. The mortgagor insured the property, but his policies were after-

wards cancelled and he died. Thereupon his administratrix took out new policies payable to the estate of the mortgagor. The property burned down and the insurance companies paid the insurance moneys to the administratrix of the mortgagor. "The deceased did not assign the policies taken out by him to the plaintiff nor was there any reference therein to the plaintiff's mortgage, nor did the plaintiff avail himself of the right given him in the insurance clause of the mortgage to insure the buildings for his own benefit." Upon default, the foreclosure suit was brought, and, among other things, the plaintiff prayed as relief "to have the lien of the mortgage declared upon the insurance moneys in the hands of the administratrix and have the same applied upon the plaintiff's mortgage."

It was argued among other things that the plaintiff had been negligent because of his failure to insure his own interest. But the Court granted the relief prayed :

"The administratrix has money that represents the real estate destroyed that was subject to the lien of the plaintiff's mortgage. * * * The husband's covenant to insure the premises, if not performed in his lifetime, can be enforced against his estate through his personal representatives to the extent of his assets in their hands. * * * In insuring a mortgage interest it *is not the debt* secured by the mortgagee that is insured but the interest of the mortgagee in the property upon which his security rests. * * * And the proceeds of the insurance is to be distributed, when upon real estate, *as real estate*, and not as personal property. * * * The administratrix had the right to execute the covenant of the deceased, and it was her duty to do so, and when she took out the four policies *in the name of the deceased and of his estate*, the presumption is that she did it in the performance of that covenant, and as a continuation to the extent thereof of the insurance that had been effected by the deceased."

In *Cromwell* vs. *The Brooklyn Fire Insurance Company*, already cited, the owner of property agreed to sell it to another, the purchase price to be paid partly in cash and partly by mortgage, it being that the vendee should insure the property and assign the policy to the vendor to protect his vendor's lien. The vendee took possession and insured the property in his own name, loss if any payable to the vendor. But this insurance having come to an end, he renewed the insurance *with the same company, making the loss payable to himself only*. After a fire had destroyed the property, the assignee of the vendor served notice of his claim to an equitable lien on the insurance moneys on the insurance companies which, in spite of the notice, paid over the moneys to the assured (the vendee). In an action against the insurance company brought to enforce the equitable lien of the vendor on the insurance, the Court sustained the lien, and compelled the insurance company to pay the loss *over again* to the vendor's assignee.

"The plaintiff," said the Court, "notified the company of his equitable lien to the insurance money before payment to Eichenlaube (the vendee). After such notice the company made the payment at its peril. * * * The company assumed the hazard of resisting the equity claimed by the plaintiff. * * * This claim does not operate as an assignment of the policy, against which the company by a condition of that instrument stipulated. They became, *by reason of the facts*, and the notice given by Cromwell, *trustees of a fund which they were equitably bound to pay to the party justly entitled*. The party entitled in this case was the plaintiff" (the vendor's assignee).

These cases show that even under the most unusual circumstances, where no doubt could exist that the assured was claiming the full benefit of the policies and seeking to deprive the mortgagee

of them altogether, the Court will nevertheless presume that the policies inured to the benefit of the mortgagee and impress his equitable lien upon them.

The case of *Louden* vs. *Waddle* (98 Pa. St., 242), has not the slightest application to the present controversy. There was no question of covenants to insure in that case—it was not even a case of insurance effected by a mortgagor. The facts before the Court in *Louden* vs. *Waddle* were these: Certain administrators mortgaged a piece of real estate to their intestate's widow. She thus became *mortgagee* of a piece of property in which she also had a dower right. *She* insured her interest in this property and upon a loss collected the insurance. The question was whether this insurance could be considered as covering the mortgage debt as well as the estate in dower, so that the mortgage could be regarded as paid by the payment of the insurance. How such a case can be cited as an authority in the present discussion we are at a loss to understand.

The case of *Stearns* vs. *Quincy Insurance Company* (124 Mass., 61), does not conflict with the above authorities and reasoning. That was a case of a covenant in a mortgage which made it incumbent upon the mortgagee to examine and approve the insurance effected for his benefit by the mortgagor. It contemplated action by the mortgagee. But the latter appears to have made no inquiry whatever and, indeed, to have had no knowledge of the existence of the insurance at all, until after the loss. Moreover, the condition required that the insurance effected for the benefit of the mortgagee should be for a sum not less than $3,200 (page 64), and the insurance actually taken out by the mortgagor was for only $2,500, only $1,500 of which covered property covered by the mortgage (page 64). All these facts were recited by the

Court and its opinion was expressly based upon them. They make it clear that the mortgagor, in taking out the policies, was only insuring his equity—his own interest in the property—and it would have been plainly inequitable to permit the mortgagee, who had neglected to inquire or to protest or to make any attempt towards the fulfillment of his part of the condition, to seize insurance which was certainly not more than was adequate to cover the mortgagor's own interest. In all these respects the case is directly opposite to the case at bar. Moreover, *Stearns* vs. *Quincy Insurance Company* was not a *cause in equity*. It was an action at law on contract, and the action was brought by the mortgagee *in the name of the mortgagor* on the theory that there had been an equitable assignment of the insurance. In deciding the case the Court took this ground for denying the plaintiff's remedy:

"Assuming that Andrews (the mortgagee) has an equitable claim to that part of the policy which covers the house," said the Court, "yet it is one which he cannot enforce in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be required to pay one loss by installments to different persons and be subject to two suits for the same cause of action, in favor of the same plaintiff."

No such objection can be made to the pending suit, which is upon a bill in equity and all of the parties are before the Court and the relief prayed is cast purposely in a form which will do equity on all sides.

The general rule referred to is well stated in *Wheeler* vs. *Insurance Co.*, (101 U. S., 439, at page 442), where the Supreme Court of the United States says:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. * * * And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense."

From the above authorities, it is clear that if the insurance policies which have been taken out by the appellant, the Penn Plate Glass Company, had been taken out by the original mortgagor, the Pennsylvania Plate Glass Company, the complainant would unquestionably have had an equitable lien upon them to the extent of the loss under the mortgage.

But the defendants claim that this equitable lien does not exist as against policies taken out by the Penn Plate Glass Company, and they found that contention on the doctrine that the covenant does not run with the land. By this they mean that the facts from which equity would draw the right of the mortgagee to a lien on insurance effected by the Pennsylvania Plate Glass Company do not exist where the insurance was effected by the Penn Plate Glass Company. But inasmuch as the whole lien, whether against mortgagor or some third person, rests upon *equitable* inference, it follows that if a *state of facts* exists from which it would be *equitable* to infer a right in the mortgage to a lien on the insurance, that lien will be inferred and impressed upon the insurance, whether the covenant does or does not run with the land. If, as we have endeavored to show, the assured bought subject to the mortgage and with a full knowledge of the insurance covenant and of the mortgagor's then

existing fulfillment thereof, and bought and held the property under circumstances which in equity, deprive it of the right to stand as a *bona fide*, innocent purchaser, and confound it, so to speak, with the original mortgagor itself, then equity must step in, just as in the case of the mortgagor's insurance, and for the same reason, and must impress upon the insurance a lien in favor of the mortgagee.

The case is clearly distinguishable from the case of *Reid* vs. *McCrum* (91 N. Y., 411). In that case, the assured was the innocent owner of the property, absolutely a stranger to the original ownership. He had obtained the property through a number of mesne conveyances, and had no connection with the mortgagor. There were present none of the circumstances which, in the present case, identify the assured with the mortgagor and make it as inequitable for the former as for the latter to deny the lien of the trustee. Moreover, as appears from the statement of facts in the McCrum case (page 413) the fire had there occurred *previous to the foreclosure*, and not, as here, long after the foreclosure was begun and was being obstructed by the defendant. The significance of the fact that the trustee's mortgage lien had already matured before the fire in this case has been amply discussed in preceding portions of this brief, and its effect upon the equities points out a broad ground of distinction between this case and that of *Reid* vs. *McCrum*. That case, however, was argued on behalf of the mortgagee on the theory that the covenant to insure ran with the land, and it was because the Court took an opposite view on that bare point that the mortgagee's contention did not prevail. Here, we do not in any sense rest our claim on the theory that the covenant runs with the land, and the two cases are wholly different. The Court, in *Reid* vs. *McCrum*, referred to *Dunlap* vs.

*Avery*, already quoted above on another point, and held that the case decided that a covenant to insure does not run with the land, and that, therefore, the matter was *res judicata*, "*unless some reason exists why the case cited should not be followed and adhered to.*" Ref rence to the *Avery* case would not seem to support the view taken of it in the *McCrum* case, that it definitely decided that such a covenant does not run with the land; but, however that may be the Court, by the above-quoted expression, expressly recognizes that there might arise a state of facts upon which it would not be proper to follow the ruling that such a covenant does not run with the land. That such a state of facts exists here we contend, claiming that while, as against a stranger purchasing this property, that covenant might have no effect, it bound the Penn Plate Glass C mpany, which was no stranger, but stood in the shoes of the Mortgagor Company, with even less equity as against the mortgagee than the mortgagor company itself possessed.

## FOURTH.

**By the Terms of their Purchase, and under the Circumstances of this Case, the Defendants Kann and the Penn Company bought subject to the Mortgage and assumed the Mortgage-Debt, or, at least, agreed to indemnify the Mortgagor against any Liability upon the Covenants of the Mortgage: and the Court below, having Jurisdiction of the Res and of the Parties, had Power, in order to prevent Circuity of Action, to enforce the Obligation by the Decree now appealed from.**

We now come to another ground upon which we contend that the decree should be sustained, wholly separate and apart from the grounds already advanced. The principles upon which we have relied in the foregoing points of our brief have had nothing whatever to do with the question as to the assumption of the mortgage debt by the purchaser, or the reciprocal obligations of the mortgagor and the Penn Company. In the present point, for the first time, we take up and discuss the case in that aspect.

The sale of the mortgaged premises to Kann by the Receiver Stoner on June 18th, 1894, was, as we have shown, made subject to the lien of the existing mortgage for $250,000; and the deed given to the purchaser on July 2d, 1894, recited that it was made "subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars

($250,000), dated January 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1."

One year later, and on July 1st, 1895, Kann conveyed the property to the Penn Company by deed, which recited that it was made "subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1."

It has already been pointed out that the considerations for which these two conveyances were made were $37,500, and $83,500, respectively. And it is admitted in the answer, as alleged in the supplemental bill, that both Kann and the Penn Company had, at the respective times, when they purchased this property, not only the constructive notice given by the explicit mention of the mortgage in their deeds, but full, actual and complete notice of all the provisions, covenants and stipulations of the mortgage, including those relating to insurance.

In the Circuit Court the Penn Company and Kann asserted that in spite of these facts they could hold the mortgaged premises free of the lien of the mortgage. This contention they have now abandoned, and they acquiesce in that part of the decree which directs a sale of the remnants of the mortgaged premises for the benefit of the bondholders. But they still deny that the terms of their purchase, or their actions after coming into possession, have raised any obligation upon their part upon or under the covenants in the mortgage. They deny that they ever assumed the mortgage debt, or that any obligation under the covenant to insure ever arose against them to indemnify the mortgagor in case it should become liable on that covenant. The

object of this point of our brief is to show that they are wrong in those denials.

For the purposes of determining the contract into which these parties have entered, the laws of Pennsylvania govern. Hence, those cases which in other jurisdictions distinguish the expression "*subject to a mortgage*" from the expression "*subject to the payment of a mortgage*" do not apply. The Courts of Pennsylvania, very properly, we think, draw no such distinction.

*Blood* vs. *Crew Ledick Company*, 171 Pa. St., 328.

Moreover, it must be remembered that this is not a case of an individual's mortgage upon a piece of land, the sale of the equity in which would leave the mortgagor fully as competent to meet the mortgage-debt as he was before such sale. We have here a mortgage made by a *corporation*, not merely upon a piece of land, but upon land, machinery, franchises, rents, issues and profits—in short, upon the entirety of the corporation—upon its whole property and stock in trade, owned at the time of the mortgage, or thereafter to be acquired. And the sale of the equity of redemption at which Kann purchased, was not an ordinary sale by an individual, but a judicial sale, of all the property of every conceivable kind belonging to that corporation made in a proceeding to wind up the corporation's affairs and to put it out of existence. The necessary effect of such a sale is utterly to wipe out the mortgagor corporation, and to destroy, if not its legal existence, at least all its capacity to do business, to raise money or to pay its obligations. And one who knowingly, and with full notice of all the circumstances, purchases subject to such a mortgage, or at such a sale, can hardly be regarded as standing towards the vendor, or

the mortgagee, in the same position as a mere individual purchasing at an ordinary sale subject to an individual's mortgage. The act of such a purchaser of corporate property must obviously result in depriving the mortgagee of all hope of collecting his mortgage—debt from the mortgagor. It must deprive him, moreover, of all hope of receiving the interest on his mortgage out of the income of the plant, except at the will of the purchaser. And if that purchaser is at liberty so to apply the income or not at pleasure, without running any other danger than that of having the property subjected to a foreclosure suit, the door would be opened to very great and very probable wrong to the mortgagee. For the purchaser, safe from personal liability, could mismanage the property at will, absorb its income, leave it unprotected and useless, dismantle it, and then be content to suffer the mortgagee to step in and seize the mere wreck of his security. Such certain evils should never be allowed to occur *in invitum*. The mortgagee is powerless to prevent them. He must stand aside—see his mortgagor swept aside—his security thrown into irresponsible hands—and do nothing. It will readily appear to the Court that, under such circumstances, the *implied* undertaking of a purchaser subject to a mortgage at such a sale must be vastly greater and more binding than in an ordinary case. It cannot be lightly assumed that the Court of Westmoreland County intended, when winding up this corporation and selling its property subject to an acknowledged mortgage, to work such injustice to the mortgagee.

We think it therefore clear, on general principles as well as by virtue of these peculiar elements, that the Penn Company, by purchasing subject to the mortgage, took the property subject to an implied covenant on its part to indemnify the mortgagor

against any liability to which it might be subjected by reason of the mortgage ; and that, inasmuch as by the very terms of its purchase, it knew that the mortgagor was thus rendered powerless for all time to meet such liability, it practically, by purchasing subject to the mortgage, *expressly* agreed to pay the mortgage debt.

Even in the case of ordinary purchases subject to a mortgage, or to the payment of a mortgage, the law in Pennsylvania has always been that by such purchases the vendees at least impliedly agree to indemnify the vendors against liability on the mortgage.

*Campbell* vs. *Schrum*, 3 Watts, 60 ;
*Blank* vs. *Garman*, 5 W. & S., 42 ;
*Woodward's Appeal*, 38 Pa. St., 327 ;
*Moore's Appeal*, 88 Pa. St., 452.

For a long time a controversy pended in the Courts of Pennsylvania as to whether in every case of a purchase subject to a mortgage the transaction did not import *something more* than this indemnity ; and some authorities held that such purchases *ipso facto* gave rise to an implied covenant, *enforceable by the mortgagee*, to pay the mortgage debt. The last word in this controversy, before it was terminated by the Pennsylvania Act of June 12th, 1878, P. L. page 205, was said in the case last cited above, *Moore's Appeal* (88 Pa. St., 452), which, though decided in 1879, adjudicated claims which arose prior to the passage of the act in question. In that case the Court said :

" An examination of the cases which have been decided on the legal effect of such a clause in a conveyance, shows, we think, that *unless there exist special circumstances to raise a covenant to pay the encumbrance*, it amounts only to an indemnity to the vendor."

And, arguing against the implication of any more extended covenant, the Court said further :

"*Surely something should appear to create the inference of such a covenant.* The words, 'under and subject' import no such thing. They import that the vendee takes the land incumbered, and at most, that in taking it in an agreed consideration which includes the incumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied as the time."

Thus, then, something *might* appear—*special circumstances might exist*—to raise a covenant to pay the incumbrance. We have already pointed out, both in this division of our brief and in prior divisions, a number of *special circumstances* which tend strongly to raise such a covenant from the purchase subject to our mortgage.

Now, when the act of 1878 was passed it is very plain that its object was to put a quietus upon all this controversy about the meaning of the bare expression "subject to a mortgage" in a deed of the equity. And to use the words of the learned Judge in the Circuit Court's opinion, the act "provided that the under and subject clause *alone* should not be construed to create a personal liability for the debt, that is a direct assumption to the owner, *but left unaffected the implied covenant to indemnity, as between vendor and vendee.*"

The language of the act makes it apparent that this was its sole object :

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall, by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is

made on condition of the grantee assuming such personal liability therefor; *Provided*, that the use of the words 'under and subject to the payment of such ground rent, mortgage or other incumbrance shall not *alone* be construed so as to make such grantee personally liable as aforesaid.'"

The defendant's counsel will argue that this act completely demolished not only the inference of the assumption of the mortgage debt claimed by some authorities to arise from the words "subject to a mortgage," *alone*, but also the inference of an agreement *to indemnify the mortgagor* against liability on the mortgage. We have, however, shown the origin of the act springing from controversy. And the above quotation, when compared with the passages quoted from *Moore's Appeal*, shows that the same idea was uppermost in the minds of the Legislature which swayed the Court in that decision, namely, that while the covenant as to indemnity between vendee and vendor must always be inferred from the bare words "subject to a mortgage" contained in a deed of the equity, yet, those words *alone*, that is, in the absence of *special circumstances*, should no longer be construed by any authority to imply a covenant to assume the mortgage debt. Under the act, as before its passage, the indemnity covenant must always be inferred; under it, as before, when *special circumstances* exist, the covenant to assume the mortgage debt may still be implied; but unless such special circumstances exist, the words "subject to the payment of the mortgage" or either equivalent are not *alone* enough to imply a covenant to assume the mortgage debt, but still continue to be sufficient to imply a covenant to indemnify the mortgagor. That this is the effect of the statute is to be gathered from the decisions in *Lennox* vs. *Brewer*, 160 Pa., St., 193, and *Blood* vs. *Crew Ledick Co.*, 171

Pa. St., 439. In the latter case the question squarely arose whether the Act of 1878 would prevent the enforcement of the implied covenant of indemnity against the vendee at the suit of the vendor, and the Court held that it would not:

"*The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendee, and for that reason the act does not apply.*"

IT FOLLOWS FROM THE ABOVE CONSIDERATIONS THAT IF THE SPECIAL CIRCUMSTANCES OF THIS CASE ARE SUCH AS WE CLAIM THEM TO BE, THE LAW WITH THEIR HELP WILL IMPLY FROM THE PURCHASE OF THE PROPERTY SUBJECT TO THE MORTGAGE A COVENANT ON THE PART OF THE DEFENDANT TO PAY THE MORTGAGE. IF, ON THE OTHER HAND, THEY ARE NOT SUCH AS WE CLAIM THEM TO BE, THEN THE LAW WILL STILL IMPLY A COVENANT ON THE PART OF THE DEFENDANT TO INDEMNIFY THE MORTGAGOR AGAINST ALL LIABILITY ON THE MORTGAGE.

Now, with one or the other of the above implied covenants certainly in existence, can it be successfully contended that, under the circumstances of this case, the liability of the vendee did not extend to the mortgage provision as to insurance? We have already seen how that provision was only one of a number of stipulations contained in the mortgage for the better securing of the debt and enforcing of the mortgagor's liability upon it.

"The duty to insure," to quote from the opinion of the Circuit Court, "was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the Supreme Court in *Miller* vs.

*Aldrich*, 31 Michigan, when speaking of the relation of a covenant to insure to the mortgage: 'Chapman had bound himself to afford Miller security supplementary to and connected with the the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and all others in his shoes with notice. Now if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt," (or to assume the mortgage debt) "shall he *not much more* be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of ensuring the payment of such mortgage debt."

This becomes the more clear when the provisions of the mortgage are recalled. By those provisions, the possession of the property is made to depend upon the fulfilment of the covenants, stipulations and agreements of the mortgage. These include the covenant to insure. For a default in any one of these covenants, the mortgaged property becomes forfeited to the mortgagee, without regard to whether the property is still in the hands of the mortgagor or sold to a purchaser subject to the mortgage. The right of the defendant to hold the property as against the mortgagee depended upon the fulfilment of the covenant to insure by the mortgagor. Can it be said, with such a provision in the mortgage, that the purchase of the property under circumstances which the purchaser knew must forever prevent the mortgagor from fulfilling that covenant, did not contemplate the inclusion of that covenant in any liability which the purchaser assumed?

The defendants seek to overcome the obvious force of these considerations by pointing to *a part*

of Article Fourth of the mortgage. Did they quote the whole of that article, the fallacy of their argument would be apparent. We here quote the entire article:

"ARTICLE FOURTH.—At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustees, or any other power of sale heretofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of the property be sold, or if it all be sold, at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said Trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

"It being expressly understood and agreed by and between the parties hereto, and by and between the said parties of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any

part of the principal or interest represented by the said bonds and coupon, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

The meaning of the above clause in the mortgage is plain. It takes away the right of the *bondholders* to bring suits upon the bonds when once the powers of the mortgage for the enforcement of the security have been fully exercised by the Trustee. In other words, when a sale of the mortgaged property shall have taken place, the right of bondholders to sue *on the bonds* shall cease. But until such sale shall take place, the right to collect the face value of the bonds with interest necessarily resides in every bondholder. But even when a sale occurred, Article Fourth would not and could not have the effect attributed to it by the defendants. They argue that by this clause all personal obligation on the mortgage debt was done away with. But it is inconceivable that bonds should be outstanding, which by their terms bind the obligor to pay a debt evidenced by them,

and yet be devoid of any obligatory force. And it is equally inconceivable that there should exist a *security* for a debt, such as a mortgage must necessarily be, and yet there be no debt to secure. By the terms of the mortgage the parties may, if they please, restrict or do away altogether with the *remedies* for breach of the covenants of the bonds and mortgage, or either of them; but it is impossible, in the nature of things, for them to destroy the *obligation* of the bonds so long as the bonds themselves endure or the mortgage continues to be a mortgage.

Now, this reflection is a very important one. For the defendants and the learned judge who wrote the majority opinion in the Circuit Court of Appeals, overlook the distinction between the obligation—that is, the liability on the debt—and the enforcement of that liability. We might concede the impossibility of enforcing such liability (which we do not concede, however), without impairing the liability itself. The situation, in such case would be precisely similar to the situation of a cause of action barred by a statute of limitations. The cause of action would still be intact and entire; its enforcement alone would be frustrated.

The importance of this distinction lies here: that in the present case there is no attempt to *sue upon the bonds*, which is the only remedy prohibited by this restrictive clause. The defendants argue that as there is no personal obligation on the mortgagor's part to pay the mortgage debt there can be no implied covenant on the part of the purchaser of the equity either to pay the mortgage debt, or to indemnify the mortgagor. The error of this argument is made manifest, we think, by the above distinction, and lies in the assumption that because one of the remedies of the obligee may be restricted, or destroyed, the personal obligation on the bonds has terminated. There *is* such a personal

obligation still resting on the mortgagor, and henee there is no difficulty about the inference of a covenant.

But our adversaries may say : Of what value is this obligation, if it cannot be enforced ? To this we answer that we are not seeking to exercise that remedy which. allowing the utmost to the other side this provision prohibits. No bondholders are here seeking to enforce the personal liability on the bonds, nor indeed is the trustee—to whom, by the way, the clause in question does not extend—seeking to do anything of that character. But what we are trying to do is to enforce, on behalf of the trustee, and in a Court of equity, *the covenant as to insurance*, which is not in any sense the covenant to pay the mortgage debt. That covenant flows out of the necessity to protect the security of the mortgage. The obligation to pay the bonds might exist without the mortgage, the covenant to insure never could. While closely connected, the two obligations are nevertheless several and distinct, growing out of the same *debt*, to be sure (a debt which, as we have shown, still exists in spite of the Fourth Article), but requiring different *remedies* for enforcement, and the covenant to insure concerning much more directly the value of the security which continues to be impressed with the lien of the debt in whosesoever hands it comes. Hence Article Fourth has no application whatever to proceedings, either direct or indirect, upon the covenant to insure, and cannot affect the duty of the Court to imply a covenant to insure on the part of the purchaser, or at least a covenant to indemnify the mortgagor against all liability upon the covenant to insure. It would seem clear that the obligation upon the implied indemnity can be enforced in this suit. The proposition which governs was so well stated by our opponents in their brief in the lower court that we quote it here :

"The purchaser of land subject to a mortgage who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624-625.
*Fuller* vs. *Hughes*, 12 N. Y., 79."

It is no answer to this point to say that there has been no breach of the covenant of indemnity. We have already pointed out that the defendant necessarily knew when it bought this property that by that very purchase it was certainly depriving the mortgagor company for all time of the power to carry out the covenants of the mortgage or to pay the mortgage debt. To have sued the mortgagor company upon the covenant to insure would have been the most idle farce. What property has the defendant left to the Pennsylvania Plate Glass Company with which that company could meet a judgment obtained in such a suit? To require such a suit as a preliminary to the present proceeding would be a travesty on justice. The result is as certain to-day as if the action had been brought and ended; and the procedure by which the mortgagor and the appellant have been joined together in this one suit is manifestly the right one.

The balance of the argument is forcibly stated by Judge BUFFINGTON, in the Circuit Court opinion, and we quote it below:

"The proofs show that request to insure was

duly made by the trustee upon the mortgagor and upon the subsequent purchasers, which request was not complied with. It would therefore seem that by such failure to insure there was a default and a direct liability of the mortgagor to the trustee upon the covenant to insure, and there was a default and a liability of the subsequent purchasers to the mortgagor upon their agreements to indemnify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months it became such a breach as warranted the trustee in either taking possession, selling at non-judicial sale or maintaining foreclosure proceedings.

"After the bill was filed, a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a Receiver to take possession of the mortgaged premises as we have noted above.

"Under the facts it would seem that a Court of equity having jurisdiction of the subject matter and of all parties, had power to, and to avoid circuity of action, would direct the purchaser to insure for the benefit of the trustee.

"This Court had jurisdiction of the mortgage and therefore of the mortgagor and mortgagee. Kann and The Penn Plate Glass Company, who had bought subject to it, were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that where equity jurisdiction has once rightfully attached to a controversy it will be made effective for the purpose of complete relief and to dispose of all incidental and germane questions. Fetter on Equity, page 13; Winton's Appeal, Pa. St., 97, P. 395; Allison's Appeal, 77 Pa. St., 227; McGowan *vs.* Remington, 2 Jones, 63; Souder's Appeal, 57 Pa. St., 498; Soucher's Appeal, 104 Pa. St., 615. The trustee having exercised its right of requiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the Court, it would seem clear to us that a Court of equity, by its very nature constituted with plastic

power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A Court of equity having original jurisdiction to compel specific performance of a contract to indemnify. Chamberlain *vs.* Brown, 6 Blackf., 490; Champion *vs.* Brown, 6 John. Ch. Rep., 398, Fry on Specific Performance (3 American Edition), p 704—its jurisdiction and power to do so in this case where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where moreover the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the Court did not see fit in an interlocutory state of the case to make such order, that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so, cannot affect the relative right of the parties. Mere lapse of time will not prevent a Court of equity from affording relief where there was a right to relief when the bill was filed. Wilkinson *vs.* Torkington, 2 Younge & Collyers Reports, 729.

"Pending the appointment of a receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it had never paid, to wit: the $250,000, representing deferred purchase money.

"Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the Court as to its liability to do so, why should not the Court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party to this litigation under stress of an application for the appointment of a receiver and a consequent ex-

clusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee and was bound to do so if thereto required by the Court. When now on final hearing the proceeds of that insurance is before the Court, when the position of the parties has not been changed, why should not this Court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order?

"The position of the parties has not changed. *To say that the trustee had an insurable interest and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers with full knowledge of that duty on the part of the mortgagee, took the property and undertook to indemnify the vendor against this covenant.* This they have not done. They paid some $83,000 for the property. They insured it for more than three hundred thousand dollars and now on the destruction of the property, which was the substantial security for $250,000 owing the trustee, they seek to avoid payment of the $250,000 and to realize on the $83,000 paid by them the sum of upwards of $300,000 in insurance upon property for which they have never paid.

"The allowance of such a result under the facts and circumstances would be highly inequitable, for it is a principle of equity that in a contest between one who is seeking to make a gain and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. Miller *vs.* Aldrich, 31 Mich., 416."

## Fifth.

In view of the large amount involved, of the elaborateness of the opinion filed in the Court of Appeals, and of the complicated questions to be considered, it may not be amiss, at the expense of reiteration, to restate some of the propositions

upon which this appeal is rested, and, under each proposition, to say something additional.

We claim :

**I.—In the mortgage the mortgagor agreed with the trustee to insure the buildings when required so to do by the latter.**

**II.—The conveyance to the Penn Plate Glass Company imposed upon it, in favor of the original mortgagor, the mortgagor's duty to insure the buildings when required by the trustee, in order that the mortgagor might be indemnified against a nonperformance of its covenant.**

**III.—The fund raised by the insurance, qua the mortgagor, is impressed with the duty of indemnifying it against its covenant to insure when required by the trustee.**

**IV.—The fund raised by the insurance, thus impressed with the duty of indemnity of the mortgagor, is collateral security for the performance by mortgagor of its duty to insure and, as such, enures to the benefit of the trustee.**

**V.—The obligation entered into by Kann and Wertheimer, whilst they were acting for the benefit of the Penn Plate Glass Company, of which**

**benefit the latter took advantage, imposed upon the latter the duty to apply the insurance money in payment of the mortgage bonds.**

**VI.—The retention of possession by the Penn Plate Glass Company, after default and after application for a Receiver, gave to the Trustee an interest in the insurance money.**

Before discussing these propositions in detail, it may be well to bring into one point of view certain stipulations of the mortgage. It recites an intent "to limit the remedy of the holder" (of the bonds secured) "in case of default in the payment of principal or interest to the subjection of the property and premises to be conveyed to the payment thereof."

The conveyance to the Trustee is of:

"Also all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises. Together with * * * all the estate, right, title, interest, property claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises and every part thereof, with the appurtenances."

The conveyance in mortgage to the Trustee is expressed to be in trust for the security of the bondholders, "and for the uses and purposes, and upon and under the terms and stipulations hereinafter expressed and contained."

Amongst the terms and stipulations, are those contained in the Tenth Article, to which special allusion will subsequently be made.

By Article Second it is *inter alia* provided that it shall be lawful for the Trustee

"To enter into or upon all and singular the premises hereby conveyed, or intended so to be, and each and every part thereof, and wholly to evade the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said plate glass company and appurtenances, conducting the business thereof, and enjoying the franchises pertaining thereto, making from time to time all such repairs and replacements, and such useful alterations, additions and improvements as may seem to be necessary and judicious to carry on the business of said party of the first part and to collect and receive all incomes, rents, issues and profits of the same and every part thereof, and after deducting all the expenses of operating and of conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges or liens, prior to the lien of these presents, upon the said premises or any part thereof."

By Article Third it is provided that there shall be deducted from the proceeds of sale of the mortgaged premises by the Trustees:

"All other expenses, advances or liabilities which have been made or incurred by the said Trustee, in operating or maintaining the said plate glass works, or in managing the business while in possession, and all payments which shall have been made by it for taxes or assessments, or for charges or liens prior to the liens of these presents upon the said premises or any part thereof."

By Article Fourth it is provided:

"It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part and the re-

spective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of sale hereby granted or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained to the contrary thereof notwithstanding."

By Article Sixth it is provided:

"The said party of the first part shall, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee or its successors, execute, acknowledge and deliver all such further deeds and assurances in the law, for the better assuring such the said trustees and its successor or successors in the trust hereby created, upon the trusts herein expressed, the premises, franchises and appurtenances hereinbefore mentioned and conveyed, or intended so to be, and all other property and thing whatsoever appurtenant thereto, whether now acquired and held or hereafter to be acquired, as by such trustee, its successor or successors, or their counsel learned in the law, shall be reasonably advised, *are required.*"

By Article Tenth it is provided:

"The right of action under this Indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this Indenture for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this Indenture shall be instituted and conducted by the trustee, according to its sound discretion."

By the same Article it is further provided:

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to *require* such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, *or require the same to be done.*"

**I.—In the mortgage, the mortgagor agreed with the Trustee to insure the buildings when required so to do by the latter.**

The learned Circuit Court of Appeals, in the opinion filed on behalf of the majority by Judge Gray, reached the conclusion that there was no duty on the part of the mortgagor to insure.

As is very forcibly shown by the dissenting

opinion of Judge Acheson, it is inconceivable that the parties would have entered into the mortgage arrangement without imposing upon the mortgagor a duty to insure the premises wholly insufficient as security unless improved. The mortgage did not mature for ten years. No funds were placed in the hands of the Trustee covering insurance. Nothing was to be paid to the bondholders saving the interest upon their bonds. A destruction of the improvements on the mortgaged premises at any time during the ten years would practically destroy the security for the bonds.

As is shown by the Tenth Article above recited, it was made no part of the duty of the Trustee "to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance * * * but the Trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

There can be no question that whilst the Trustee is not bound, as part of its duty to the bondholders, its *cestuis que trustent*, "to effect insurance against fire, etc.," yet that in its discretion in may effect such insurance. Its discretion extends not only to the effecting the insuranee itself, but also to "requiring" the same to be done.

The Century Dictionary defines "*require*" thus:

"To ask or claim as of right, by authority; demand; insist on having; exact."

A power is given to the Trustee, corcerning the specific subject matter of insurance, to require somebody to effect the same. This power necessarily comprehends a duty on the party upon whom the requisition can be made to comply therewith.

It clearly was not the intent of the stipulation

that the bondholders should effect the insurance. No funds applicable to the purpose were in their hands.

The mortgage, as we have seen, is made under "the terms and stipulations hereinafter expressed and contained." Amongst these terms and stipulations is the one we have recited concerning insurance.

Nothing is more reasonable than to suppose the parties would stipulate for insurance. We submit that such stipulation is expressed with clearness, and sufficiently, by the clause we have recited, authorizing the Trustee to require, *inter alia*, the effecting of insurance if, in their discretion, they shall determine not themselves to effect the same.

The contemporaneous construction of the instrument by both the parties thereto in the taking out of insurance for the benefit of the Trustee and in the renewing the same, is very significant, far overbalancing any weight to be attached to the fact, upon which Judge Gray dwells so strongly, that the requirement is embodied in but few words, at the end of a clause limiting the personal responsibility of the Trustee in case of its not doing certain enumerated things.

In the Court below, a suggestion was faintly made, which was apparently rejected by the Court of Appeals, to the effect that there was nothing said, expressly, about insuring for the benefit of the Trustee. What was to be done under requirement, in the way of insurance, was put as an alternative to what might be done by the Trustee itself in its discretion. Of course, the Trustee, if it should insure, would do so in its own name for the benefit of the *cestuis que trustent*. It had a right to require to be done by the mortgagor what it could have done itself, viz.: insure for their benefit.

In considering the probability of an intention by

the parties to impose a duty upon the mortgagor to insure upon demand, we must bear in mind the fact that payment of principal and interest of the bonds could only be obtained out of the mortgaged premises. Any covenant to insure must necessarily have covered an insurance for the benefit of the bondholders.

Amongst other things the trustee had a right to require the renewal of policies of insurance. The original policies were taken out for its benefit. The right to "renew" was, of course, a right to demand that renewal policies should be continued upon the original basis, in the name of the original payee.

The learned Court of Appeals held that there was no duty even upon the original mortgagor, to comply with a requirement by the trustee to effect insurance, and, in thus holding, sought to destroy nearly every basis upon which the complainant rests. Whilst all other propositions were also decided against the complainant, there was fixed in the minds of the majority of the Court, an idea that there was no solid foundation for the complainant's contention. This probably affected its judgment upon the remaining propositions.

Let us examine the grounds upon which Judge Gray, in his elaborate, and very able, opinion, rested his denial of the duty of the mortgagor to insure. He says:

"It requires attentive reading to discover the language in these paragraphs which would give color to the contention of complainant below as to the existence of a covenant therein on the part of the mortgagor, to insure for the benefit of the mortgagee and bondholders. It is upon the words 'or require the same to be done' in the last paragraph quoted the complainant below relies."

Conciseness of expression ought not to operate

to defeat a right if the same be expressed. Prolixity is not a virtue, nor should it meet with the favor of the Courts. A most vital provision, omitted in the first drafting of an agreement, might be inserted in a few words of interlineation, without any impairment of its obligation.

Judge Gray calls attention to the fact that the provision concerning insurance, is imbedded in the Tenth Article of the mortgage, amongst paragraphs "obviously concerned with limitations on the responsibilities and obligations of the mortgagee and trustee, to the bondholders," whilst "other articles in the mortgage are concerned with prescribing as between the mortgagor and mortgagee the terms or conditions upon which default or forfeiture of the mortgage may be declared by the mortgagee," etc., etc. He then adds:

"But in the paragraphs quoted after the operative and conveying and defaulting clauses in the mortgage, which have to do with the relations of mortgagor and mortgagee, we have here in the Tenth Article, what naturally belongs to such an instrument, viz.: A declaration and qualification of the trusts assumed in said mortgage by the mortgagee, as trustee, to the bondholders. The language implied is not contractual as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to his *cestui que trust*. The mortgagor could have no interest in the duties or responsibilities assumed by the trustee to the *cestui que trust* and the limitations and qualifications put upon those duties and responsibilities so assumed could not affect in any degree the liability of the mortgagor."

The Tenth Article, at least in its earlier portion, is directly concerned with a matter in which the mortgagor is interested, viz., in the forbidding the bondholders to institute actions or other proceeding under the mortgage, and in the requiring that the latter shall be enforced by the Trustee.

The concluding part of the Tenth Article is one in which the mortgagor, as well as the *cestuis que trustent*, is interested :

"It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act of any agent, attorney or employee selected with reasonable discretion ; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same ; and all such fees, commissions, compensation and disbursements so constituting a lien on the mortgaged property and premises."

If, in the exercise of its discretion, the Trustee should see fit to advance the moneys requisite to secure or renew insurance, it was given the right to treat its disbursements in that respect, as a lien on the mortgaged premises. How then can it be said that the mortgagor is not interested in the particular portion of the Tenth Article to which the learned Judge refers? A duty to reimburse advances for insurance, made by the Trustee, is imposed as a contractual duty by the portion of the Article the learned Judge dwells upon as dealing only with the regulation of the relations between the Trustee and its *cestuis que trustent*.

We submit, with great respect, that the interpretation put upon the Tenth Article by the learned Judge, whilst able, is too finely drawn and narrow. It utterly fails to point to any person upon whom the requirement can be made.

A right to require the effecting or renewing of insurance can hardly be said to be one confined to the fiduciary relation between Trustee and its *cestuis que trustent*. It directly concerns the relation of mortgagor and mortgagee.

The learned Judge further says, speaking of the requirement:

"It occurs at the close of an enumeration of a number of things, which the Trustee declares it shall not be under obligation to its *cestuis que trustent* to do. So that it is not the case of the Trustee speaking specifically about its exemption from obligation to insure, and saying as to that it may, in its discretion, insure or require the same to be done, but it is a case where the Trustee, having exempted itself from liability in a number of matters, reserves to itself, in a general phrase, the right, if it sees fit, to do any of the enumerated things."

The vice of what is thus said lies in the fact that the learned Judge does not add to the words, "to do any of the enumerated things," the additional words, "or require the same to be done."

There is some force in the observation that if a Trustee stipulates it shall not be its duty to do certain things beneficial to the *cestuis que trustent*, it thereby deals only with its relations with the latter. Its force is broken, however, by the fact that the stipulation does not appear in a declaration of trust, but in an instrument between mortgagor and mortgagee, defining the terms and conditions of the mortgage.

Its force is wholly lost, when we consider that the Trustee, if it had been dealing solely with its relations to its *cestuis que trustent*, would have stopped with the statement of the things it was not to be compelled to do. After this stipulation, however, it adds that it may, in its discretion, do certain things, or that it may require them to be done. The mortgagor executed an instrument in which it provided that the Trustee might require a thing to be done which, necessarily, could be required from it alone. We submit that the question as to the person upon whom the requisition

may be made, and as to the right to make the same, is not affected by the fact that there are a number of things concerning which may be required, especially where it is provided, concerning such right to require, that it is applicable to "any or all" of such antecedent matters.

The learned Judge adds:

"In applying this phrase to the preceding enumeration of things, as to which the trustee claims exemption, we find there are certain acts which refer to an individual performance on its part; as, for example, it is not obliged to 'file of record the mortgage,' 'or renew such mortgage,' or 'procure further assurance,' or 'do any act suitable for the continuance of the lien,' or 'give notice of the existence of the lien,' or 'effect insurance against fire,' or 'renew policies of insurance.' These are all things to be done or not to be done by itself. Then we have the following: It is not obliged 'to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made.' Here is a matter as to which there is a distinction made between the direct personal act of the Trustee itself and what it may require another to do, and the language immediately following would seem to have been framed with direct reference to that distinction, so that when the Trustee says 'it may in its discretion do any or all of the matters or things in this paragraph set forth, or require the same to be done,' it was to make it applicable among other things to the language just referred to in regard to the payment of taxes. The alternative phrase, or 'to require the same to be done,' makes the whole reservation of authority to the Trustee cover more completely (verbally at least) the preceding enumeration of acts and things as to which it had exempted itself from liability."

As the learned Judge says, there are certain acts of individual performance which the Trustee is not compelled to do; but in its discretion may do, or in its discretion may require to be done. Its discre-

tion may be exercised in the doing, or requiring to be done, of any or all of the matters which by the clause may by it be done.

Concerning the payments of taxes and assessments, the Trustee wished to exempt itself from liability to keep itself informed or advised as to whether they were or were not paid, and also from all liability to require such payment. What it exempted itself from, however, was any liability for its personal act, in not informing, or advising itself, as to such payment, or in not requiring such payment. The provision which followed therefore, viz., that it might, in its discretion, "do any or all of the matters or things in this paragraph set forth, or require the same to be done," was applicable to its discretion to keep, or not to keep, itself informed or advised of the payment, or to require, or not to require, payment of taxes and assessments. It was not obliged to keep itself informed or advised as to the payment; but, in its discretion, it might do so. It was not compelled to require payment of the same to be made; but in its discretion it might require. In its discretion it might require the mortgagor to inform, or to advise, it, as to the matter of such payment. The mere fact that it had a discretion to require the payment of the taxes does not diminish the force of the subsequent phraseology authorizing it generally concerning "any or all of the matters or things in this paragraph set forth, to require the same to be done."

The learned Judge also dwells upon the fact, that Article VI of the mortgage specially provides for giving "further assurance" and that in the Tenth Article the trustee is not obliged to procure "any further other or additional instrument of further assurance," though in its discretion it may procure the same, or require the same to be given and finds, in this fact, something which militates

against the holding the mortgagor subject to a requirement to do the things specified in said Tenth Article.

We submit that there can be no conclusion that the trustee was not authorized to require the mortgagor to give further assurance, from the fact that there was a special clause covering such further assurance. With regard to the same, as to other things particularized, it was desired to put clearly the fact of the right of the trustee, though not compelled so to do, to require a doing.

**II.—The conveyance to the Penn Plate Glass Company imposed upon it in favor of the original mortgagor, the mortgagor's duty to insure the buildings when required by the trustee, in order that the mortgagor might be indemnified against a non-performance of its covenant.**

Under this head, we will not repeat the argument already made *in extenso* in our brief, in its earlier portions. As between a mortgagor and its grantee, taking a conveyance subjected to a mortgage, there can be no doubt as to the duty of the grantee to exempt the mortgagor from any liability growing out of such mortgage. By such conveyance, the mortgagor charges upon its grantee, the duty theretofore encumbent upon it, by virtue of such mortgage. Indemnity against the same is the right of the mortgagor for which it gives consideration upon settlement for the purchase money, in the shape of an allowance of its amount.

It well may be, that a mortgagee has no direct right to claim the benefit of a contract between the mortgagor and its grantee, for which it gives no consideration; but there ought to be no doubt as to the meaning of a conveyance of premises thus subjected to a mortgage, or as to the right of

the mortgagor as a contracting party, to enforce the implied agreement, meant to be entered into.

The purpose of the Act of 12th June, 1878 (P. L., 205), was not to deal with the liability imposed upon a grantee, by the conveyance to him of premises subject to a mortgage, which he assumed as part of the purchase money. It dealt with the personal liability theretofore held to exist, on the part of the grantee, in favor of the mortgagee, to pay the mortgage; not with the duty to the mortgagor to indemnify it in case of its being compelled to pay what it had furnished the grantee with funds with which to liquidate.

Necessarily, the statute dealt only with the right of the holder of the ground rent, mortgage, or other encumbrance, because the provision was that the grantee should "not be personally liable for the payment." Any other interpretation of the act would work a gross fraud, by permitting a person buying property for, say, $10,000 subject to a mortgage of $5,000 assumed by him, to refuse such payment not only to the mortgagee—but in case of an exaction from the mortgagor of payment of the residue in case of a deficiency upon foreclosure, to refuse to reimburse the latter.

In a long line of antecedent cases, it had been held that the conveyance of property subject to a mortgage, gave a right to the mortgagee, as against the grantee, to demand payment directly. These decisions were meant to be neutralized by the statute. In the case of *Blood* vs. *Crew*, 171 Penna., 339, where the question which was involved was the vendor's right to enforce the implied covenant of indemnity against the vendee, the Court held:

"The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendor, and for that reason the Act does not apply."

The appellee, however, contends that there is nothing against which the mortgagor can be indemnified, because of the provisions in the mortgage which exempts the mortgagor from all personal liability for payment of the principal or interest thereof.

Let us concede that the mortgage does exempt the mortgagor, and all persons interested therein, from any suit or proceeding "for the collection of any part of the principal or interest represented by the said bonds and coupons," and that the sale of the mortgaged premises, under foreclosure, is agreed to operate as a full and complete satisfaction and discharge of the indebtedness of the mortgagor upon the said bonds and the coupons accompanying the same, whether the premises be bidden in for the whole amount of the indebtedness, or for a less price.

The argument of the appellee in this particular loses sight of the fact that there are covenants by the mortgagor, including the one to effect insurance when required by the trustee, which are not included within the stipulation for exemption from liability in case of failure of the proceeds of the mortgaged premises fully to liquidate the bonds and coupons. The provision of exemption is meant only to cover the case of liability for the amount of the indebtedness secured by the mortgage and does not exempt the mortgagor from its duty to perform its collateral covenants.

The bondholders were willing to rely upon reimbursement out of the proceeds of sale of the mortgaged premises because the trustee took collateral covenants. They knew that if the premises should be burnt and if there should be adequate insurance thereof, the security would be sufficient. Relying upon performance of the collateral covenants, they were willing that a stipulation, limiting reimbursement to the mortgaged premises, should be in-

serted. Because of this reliance upon the value of the latter, unimpaired by failure to perform what was collaterally agreed upon, it was insisted that the mortgager should agree to insure. In case of its failure to insure, and of loss resulting therefrom, it would be responsible, despite the provision exempting it from liability for payment of the bonds and coupons. In subjecting its grantee to the mortgage, it charged upon the latter the duty of indemnifying it against any loss which might result from breach of the insurance covenant.

It was suggested in the Court below that the agreement of exemption covered more than an exemption from liability to pay the indebtedness. In support of the suggestion reference was made to these words:

"The sale of said mortgaged premises * * * shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and coupons accompanying the same, and of the obligation and covenants herein contained, whether the said premises shall be bidden in for the whole amount, etc., etc."

If the words "of the obligation and covenants herein contained" were meant, which we deny, to include such covenants as that to insure, they were certainly not meant to exempt from liability for a past breach, but simply from any future obligation of the covenant, unbroken at the time of foreclosure sale.

It is not necessary, however, to discuss the question of whether or not it was meant to exempt from liability for a breach of covenants, before the happening of the event, a sale, which was to discharge the obligation of the same, in view of the fact that at the time of the fire there had been no sale of the premises under judicial

proceedings or otherwise. The fire occurred on the 12th April, 1898. The foreclosure took place under a decree entered on the 25th day of July, 1899. If, therefore, the mortgagor covenanted to insure, when demanded by the trustee, the right of the trustee to insist that there should be a payment to it of the purchase money, or that it should be compensated for the breach, had matured, at the time when the covenant, however it is to be construed, was in operation. At that time, the mortgagor was entitled to demand performance by the grantee, of its duty to indemnify it, and if there was a fund which, because of the duty, was liable to be appropriated, the rights therein of the respective parties were at that time vested. No subsequent sale under foreclosure could divest the same.

Concerning the contention we have been making under this head Judge GRAY says:

"So far, then, we must conclude that, the implied contract arising from the words, 'subject to the mortgage,' is simply and solely a contract between the grantor and grantee of the equity of redemption, and can have no greater or other effect, at the most, than an express contract on the part of the grantee with the grantor, to pay the mortgage debt, and that this contract must be measured by its own terms; that such an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage, except those which run with the land, and those would be binding on the purchases, irrespective of any contract to pay the debt. As it is conceded that the alleged contract to insure in this case does not run with the land, an obligation to pay the mortgage debt on the part of the grantee of the equity of redemption, if any such exist,' of itself imposes no obligation to insure. This being so, it would seem to deprive of all force the argument of complainant last adverted to, viz.: that, inasmuch as the mortgage provides that in case of default in the performance of any of the covenants of said

mortgage, the same shall, at the election of the mortgagee, become due and payable, and that foreclosure proceedings having been instituted (whether distinctly for this special default, or not), there was a right in the complainant trustee to enforce, by entry and holding possession, the lien of the mortgage for such a breach of this covenant, and that such lien is hereby impressed on this insurance fund, payable by the terms of the policies to the appellant company in its own right. But, if it be true, as we have stated it to be above, that the implied contract of the appellant, as grantee of the equity of redemption, with the mortgagor and grantor, to pay the mortgage debt (if such implied contract existed), does not draw with it an obligation to perform the covenants of the mortgage, the *nexus* between such default and the funds resulting from insurance, taken out by appellant company, in its own right and for its own benefit, fails to be established."

He further says:

"First, was there an obligation resting on the appellant company to indemnify the mortgagor for his liability under the alleged contract to insure, by reason of the conveyance to it of the mortgaged premises, expressly subject to the mortgage; * * *

"As we understand complainant in its brief and argument to practically admit that this is so, further discussion on this point is unnecessary. The reasoning that would exclude the implication of a direct obligation on the part of the defendant company to insure for the benefit of the mortgagee, by reason of its having become the grantee of the equity of redemption, subject to the mortgage, would seem also to exclude the implication of an obligation to indemnify the mortgagor on his convenant to insure. The taking expressly 'subject to a mortgage for $250,000,' may well be equivalent, as we have before stated, to an express contract to be responsible to the mortgagor for the mortgage debt, as part of the purchase-money, but there is no implication in such a taking, that the grantee is to be liable on the personal covenant of the mortgagor to insure. It is not

within the terms of the contract, and it would be doing violence to the situation to impose such a liability, without some evidence of assent on the part of such grantee. The only way in which the grantee of the equity of redemption becomes liable to the mortgagor and vendor, even to pay the mortgage debt, is by virtue of the contract, expressed in the direct assumption of the mortgage as part of the purchase-money, and, in the absence of such an assumption, it would be creating a contract for such grantee, to hold him responsible for any covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee.

"We are here dealing with contract, not with status, and no claim can be enforced against the appellant company, either directly or indirectly, by the impressment of lien on its money or property, unless such claim rests upon an actual contractual relation, or upon such conduct of appellant as amounts to fraud, and estops it from denying such claim."

The learned Judge further says:

"There is still another ground upon which exemption from the liability to insure for the benefit of the mortgagee could be claimed by the defendants in this case; that is, that under the fourth article of the mortgage, the mortgagor is exempted from all personal liability for the mortgage debt, and as, under the Pennsylvania law, as declared by its supreme court, the liability of a purchaser of mortgaged premises, under and subject to the mortgage, was one of indemnity to his grantor in respect to such mortgage debt, it follows that such liability could exist in the present case. As the liability to indemnify the mortgagor on his covenant to insure is incidental and subordinate to his liability for the mortgage debt, no such liability to indemnify rests upon the appellant company and grantee in this case. This view would, of course, destroy the basis for any derivative claim on the part of this complainant, with respect to such liability."

Concerning what is said in the last of the above

quotations, we do not care to add anything to the argument we have already made upon the subject. The exemption from personal liability for the mortgage debt, did not cover the covenant by the mortgagor to insure. It was impossible to bring any suit for the indebtedness itself, either before or after sale under foreclosure, in view of the positive prohibition of any suit or proceeding for the collection of any part thereof, excepting to such extent as should be necessary to recover possession of the mortgaged premises. There was no prohibition of action by the Trustee, founded upon breach of the covenants to care for, and to insure, the premises. Will it be pretended that if the mortgagor had injured the premises by negligence it would not have been liable to suit at the instance of the Trustee, upon its covenant, although it might not have been liable to a suit to recover the debt? The mortgagee agreed to limit its rights to a foreclosure of the mortgage, upon the condition that the covenants concerning the premises mortgaged should be performed.

The learned Judge asserts, in the clearest way, the opinion of the majority of the Court, that although the grantee might have been obliged to indemnify the mortgagor against any liability by the latter for the payment of the bonds, yet that it was not obliged to indemnify against the non-performance of the mortgagor's covenants. This opinion, we submit, is radically wrong. If the mortgagor was liable upon its covenant to insure, it certainly charged upon its grantee, when it conveyed the premises to it for a consideration diminished by the amount of the mortgage, with an agreement by the grantee to take subjected thereto, the duty to indemnify it against non-performance of such covenant. Had the grantee paid the mortgage debt, as was its duty, the mortgagor would have been relieved from all liability because

of non-performed covenants which merely secured collaterally such payment. It was not possible for the grantee to neglect payment of the debt it had assumed and by reason thereof to throw upon the mortgagor liability for breach of covenants such as those to insure.

The assumption of the mortgage necessarily carried with it the duty to do everything requisite to relieve the mortgagor from any liability by reason thereof. We do not find in the opinion we are criticising any attempt, by reasoning, to support the assumption of a liability by the grantee less extensive than that imposed by the mortgage, which as between mortgagor and grantee the latter undertook for an adequate consideration to pay.

It was not necessary for the complainant to contend that a covenant to insure ran with the land. It did contend, however, that such covenant was part of the obligations embodied in the mortgage against which the grantee undertook to indemnify. It was the mortgage which was assumed, and the covenant to insure was a part thereof. The grantee not only failed to pay the mortgage debt, but also neglected to perform collateral covenants, with the result of liability thereby imposed upon the mortgagor, although it had undertaken to relieve it therefrom.

Let us concede for the sake of the argument that the mortgagor could not be compelled to pay the mortgage debt and that because it could not be thus compelled there could be no collection of the same, yet there remains the fact that, as between the mortgagor and the grantee, the latter had assumed such payment, and upon such assumption the mortgagor had insisted, probably because it could be held liable upon its covenants in the mortgage. The result of the failure by the grantee to perform its obligation to the mortgagor to pay was to throw upon the latter a liability for a breach of covenant

against which it had a right to demand to be indemnified.

**III.—The fund raised by the insurance, qua the mortgagor, is impressed with the duty of indemnifying it against its covenant to insure when required by the trustee.**

We have heretofore endeavored to show (1) that the duty which the mortgagor owed to the trustee was to insure upon demand, and (2) that the duty which the grantee owed to the mortgagor was to indemnify it against a failure thus to insure.

The learned Judge concedes that if the mortgagor had remained the owner of the premises and had effected the insurance which was in existence at the time of the fire the insurance money would have been a fund impressed with the lien of the mortgage debt.

It was impossible not to concede this proposition, in view of the decision of this Court in *Wheeler* vs. *Insurance Company*, 101 U. S., 439, to this effect:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgage the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed."

Judge GRAY himself puts the proposition with force and conviction when he says:

"Equity regards as done that which ought to be done. And therefore, if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee, or to assign the same, before or after loss, the fund arising therefrom is clearly within the operation of the fundamental

maxim just quoted, because the mortgagor was bound to so fulfill his promise to the mortgagor as that funds arising from insurance effected by the mortgagor should belong to the mortgagee, at least to the extent of his, the mortgagee's, interest in the property insured. This promise, or executory contract, equity will enforce, by impressing such funds with a lien in favor of the mortgagee, whether in the hands of the mortgagor, his heirs, executors or administrators, the insurance company, or voluntary assignees of said funds, or purchasers, or encumbrances thereof, with notice. Walker *vs.* Brown, 165 U. S., 654, 664. Pomeroy's Eq. Jur., vol. 3, sec. 1233."

Judge Gray denies that any lien upon any such insurance money exists in favor of the mortgagee because, as he says, there is no contract between the grantee and the mortgagee to insure for its benefit, and there is a consequent lack of "the first essential requisite to an equitable lien."

We are not under this head discussing the right of the trustee. What we are for the moment contending for is, that there is a right of equitable lien in favor of the mortgagor, reserving the duty of establishing a derivative right to this lien in favor of the Trustee, for discussion under the next proposition.

The learned Judge thought the appellant rested its claim upon an assertion of a direct right, as between it and the grantee, when, in point of fact, it rested it upon the assertion of (1) a right as against the grantee on the part of the mortgagor, and (2) a right against the fund derived by equitable principles, through that of the mortgagor.

We fail to discriminate qua a fund raised under insurance against fire, the case of a mortgagor which has charged upon its grantee the duty of performing its covenant to insure, in the mortgage contained, and the case of a mortgage as against the mortgagor, where the latter has remained the owner of the premises.

It being conceded that if the latter effects insurance, the mortgagee is entitled to a lien upon the insurance moneys because of the covenant to insure, why does not a lien attach upon these moneys under like circumstances, *qua* the mortgagor, where it has charged upon its grantee the performance of the duty?

Assume the case of a mortgage to secure a debt of the mortgagor for which it is personally liable; a covenant to insure contained therein; a conveyance to the grantee subject to the mortgage; insurance effected in the name of the grantee; a destruction by fire; a payment of insurance moneys; and a collection of the mortgage debt from the mortgagor. Under these circumstances, would not the mortgagor be entitled to a lien, by way of indemnity, upon the insurance moneys? As between mortgagor and grantee it was the duty of the latter to insure. It did insure; the moneys in hand are properly applicable to cover performance of the covenants.

The case we have put differs from the one before the Court only in the fact that there is no personal liability on the part of the mortgagor to pay the mortgage debt; but as we have shown, there is a liability for breach of the covenant to insure.

Under the principle conceded by Judge Gray, that "if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee or to assign the same before or after loss, the fund arising therefrom is clearly within the operation of the fundamental maxim," why is not the grantee, who has covenanted with the mortgagor that insurance shall be effected, liable in case of loss, to have the insurance fund subjected to a lien because of the duty to indemnify?

It was the duty of the grantee, *qua* the mortgagor, to insure. It did insure. The fund is in court. Can we conceive that a court of equity,

under such circumstances, would compel a mortgagor entitled to indemnity, to sue a grantee, possibly irresponsible, where it had under its control a fund resulting from the doing of what the grantee was compelled to do?

**IV.—The fund raised by the insurance, thus impressed with the duty of indemnity of the mortgagor, is collateral security for the performance by mortgagor of its duty to insure and, as such, inures to the benefit of the trustee.**

In *Keller* vs. *Ashford*, 133 U. S., 610, the syllabus reads thus:

"An agreement in a deed of real estate, by which the grantee assumes the payment of a mortgage made by the grantor, is a contract between the grantee and the mortgagor only; and does not, unless assented to by the mortgagee, create any direct obligation, at law or in equity, from the grantee to the mortgagee. But the mortgagee may avail himself in equity of the right of the mortgagor against the grantee. And if the mortgagee, after the land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, and after he has recovered a personal judgment against the mortgagor, execution upon which has been returned unsatisfied, brings a suit in equity against the grantee alone, and the omission to make the mortgagor a party is not objected to at the hearing, it affords no ground for refusing relief."

In the opinion of the Court, delivered by Mr. Justice GRAY, the whole subject of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt is discussed, with exhaustive learning and presentation. It is said:

"In the case at bar, the promise of Ashford was to Thompson and not to the mortagees, and there

was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrances; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

"In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. *Parsons* v. *Freeman*, 2 P. Wms., 664, note; *S. C.* Ambler, 115; *Oxford* v. *Rodney*, 14 Ves. 417, 424; *In re Empress Engineering Co.*, 16 Ch. D., 125; *Gandy* v. *Gandy*, 30 Ch. D., 57, 67.

"But it has been held by many State Courts of high authority in accordance with the suggestion of Lord Hardwicke in *Parsons* v. *Freeman*, Ambler, 116, that in a Court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

"This result has been obtained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Maure* v. *Harrison*, 1 Eq. Cas., Ab. 93; pl. 5; Bac. ab Surety, D. 4; *Wright* v. *Morley*, 11 Ves., 12, 22; *Phillips* v. *Thompson*, 2 Johns, Ch. 418; *Curtis* v. *Tyler*, 9 Paige, 442, 435; *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175; *Gampton* v. *Phipps*, 108 U. S., 260, 263.

"In *Hampton* v. *Phipps*, just cited, this Court declared the doctrine to be well settled, and applicable 'equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all;' and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt than the sureties had agreed between themselves that he

should bear, and he had not been compelled to pay a greater share.

"The doctrine of a right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a Court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

"It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage. *Halsey* v. *Reed*, 9 Paige, 446, 452; *King* v. *Whitely*, 10 Paige, 465; *Blyer* v. *Monholland*, 2 Sandf. Ch., 478; *Klapworth* v. *Dressler*, 2 Beasley, 62; *Hoy* v. *Bramhall*, 4 C. E. Green, 74, 563; *Crowell* v. *Currier*,

12 C. E. Green, 152; *S. C.* on appeal *nom. Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, 650; *Arnaud* v. *Grigg*, 2 Stew. Eq., 482; *Youngs* v. *Trustees of Public Schools*, 4 Stew. Eq., 290; *Crawford* v. *Edwards*, 33 Michigan, 354, 360; *Miller* v. *Thompson*, 34 Michigan, 10; *Higman* v. *Stewart*, 38 Michigan, 513, 523; *Hicks* v. *McGarry*, 38 Michigan, 667; *Booth* v. *Connecticut Ins. Co.*, 43 Michigan, 299. See also *Pardee* v. *Treat*, 82 N. Y., 385, 387; *Coffin* v. *Adams*, 131 Mass., 133, 137; *Biddel* v. *Brizzolara*, 64 California, 354; *George* v. *Andrews*, 60 Maryland, 26; *Osborne* v. *Cabell*, 77 Virginia, 462.

"The grounds and limits of the doctrine, as applied to such a case, has been well stated by Mr. Justice DEPUE delivering the unanimous judgment of the Court of Errors of New Jersey, in *Crowell* v. *St. Barnabas Hospital*, as follows:

"'The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

"'The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys paid.

"'In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors."

"'But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of

the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt.

"'Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a Court of equity to a mortgage not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action and save the mortgagor, as the intermediate party from being harrassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity upon which his relief depends is the right of the mortgagor against the vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor' (12 C. E. Green, 655, 656).

"The decisions of this Court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a Court of Equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake. *Elliott* v. *Sackett*, 108 U. S., 132; *Drury* v. *Hayden*, 111 U. S., 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd* v. *May*, 115 U. S., 505,511."

In *Anthony* vs. *Glucose Company*, 146 N. Y., 407, the syllabus reads:

"A new corporation having been organized by the transfer to it of the property and business of certain original corporations, upon an agreement between the corporators of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation not reserved for the use of the treasury, certain stockholders in one of the original corporations brought an action against the new corporation for a delivery of its stock to them. *Held*, that the action was maintainable against the new corporation, and that such stockholders were not to be turned over for relief to their own original corporation after by agreement all its functions had ceased, although it might not be wholly dead, it appearing that the new corporation owed a contract duty directly to the individual corporators and not to their corporate entities."

The mortgagor owed to the Trustee a duty to insure. It turned over to the grantee the performance of this duty. The grantee insured and, by reason of the insurance which it was its duty to effect, a fund was raised which was in the possession of the Court. Upon this fund, as we have endeavored to show, because of its right to indemnity, the mortgagor had a lien. This was collateral security for performance of the covenant. It inured, under thoroughly well settled equitable principles, derivately through the mortgagor, to the benefit of the Trustee.

The mortgagor would not have been permitted to dispose of this lien because of the equitable right of the Trustee.

It is conceded that if the property had not changed hands and if the insurance money had been in court, it would have been subject to an equitable lien in favor of the Trustee, because it had resulted from the performance of a duty. In the present case the mortgagor imposed the duty upon its grantee. The fund raised was charged with the duty and because thereof became impressed with a lien which the Trustee could enforce.

By the mortgage itself, as we have seen, there was a grant of "all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by such party of the first part, situate on, or appurtenant to, above described premises." It is not difficult to hold the insurance moneys to be personal property "appurtenant" to the mortgaged premises.

There is also a covenant, in Article Sixth, to assign, from time to time, "all other property and things whatsoever appurtenant thereto, whether now acquired and held or hereafter to be acquired."

In this connection Judge GRAY said:

"But the property or 'estate' which came to the hands or the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court, here, however, is asked to press a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject matter of a promise on its part."

We have endeavored to show that the fund upon which a lien is sought to be impressed, is one upon which the mortgagor had a lien which inured to to the benefit of the trustee.

Judge GRAY further says:

"It is hard, under these circumstances, to see that these particular funds were any more subject to a lien in favor of complainant than funds of the defendants on deposit with its bankers, or moneys coming to it from any other source. Equity will, under some circumstances, enforce the performance of a contract, or of a duty growing out of a contract, through the indirect methods of the recognition of an equitable lien or assignment, but it will not in the absence of fraud

create the duty or obligation independently of a contract, expressed intent or will, at some time entered into or declared by the party sought to be charged."

Of course there would have been no lien in favor of the mortgagor, and "*a fortiori*," there would have been no lien, derivative or otherwise, in favor of the Trustee, upon the general funds of the grantee. The fund upon which the lien was asserted, was one which would have resulted if a covenant had been performed. It stood in lieu and place of performance.

**V.—The obligation entered into by Kann and Wertheimer, whilst they were acting for the benefit of the Penn Plate Glass Company, of which benefit the latter took advantage, imposed upon the latter the duty to apply the insurance money in payment of the mortgage bonds.**

As the result of the proceedings for the appointment of a receiver in the court below, it was agreed by all concerned that a bond should be given covering the matter of insurance. Whilst this bond was given by the President of the Company and by its principal stockholder, in their individual capacities, it was so given with the full knowledge of the appellee and for its benefit. It is bound, in equity, having received the benefit which resulted therefrom, to abide performance.

In this bond it is covenanted :

"That in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the double amount of such valid bonds, out of policies

of insurance existing in favor of the Penn Plate Glass Company.

*Provided*, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said proporty, is bound or liable by anything contained in the said mortgage or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage."

Under this head we claim if, by virtue of the deed to it, it became the duty of the grantee to insure, that by virtue of the terms of the covenant we have just quoted, the insurance money inured to the benefit of the trustee.

We contend that this covenant imposed upon the Plate Glass Company the duty to appropriate the insurance moneys, in case of fire, if there was any duty upon it to insure, however the same arose.

We have endeavored to show, and will not repeat our argument to that effect, that by virtue of its assumption of the mortgage, at least in favor of the mortgagor, it became the duty of the grantee to perform the mortgagor's covenant to insure, upon demand.

It will be observed that the insurance moneys are to be applied for the benefit of the mortgage bondholders if "the present owner of the said property is bound or liable, not 'merely by anything contained in the said mortgage;' but by virtue of the 'terms of its purchase of the described mortgaged premises,' to keep and maintain insurance for the benefit, etc."

The mortgagor was bound to keep and maintain insurance for the benefit of the bondholders. It charged the duty to keep and to maintain such insurance for the benefit of said holders upon the grantee. It matters not that the Trustee could not sue the grantee upon the assumption. The duty

existed, because of a consideration which moved from the mortgagor. The proviso to the covenant was, not that the duty should exist by reason of anything contained in the mortgage alone; but also by virtue "of the terms of its purchase of the described mortgaged premises."

We therefore submit that it is not necessary for the appellant to do more than to prove that the mortgagor, by the terms of its deed to the grantee, had obliged the latter to keep and maintain insurance for the benefit of the holders of bonds in order that it might be indemnified

**VI.—The retention of possession by the Penn Plate Glass Company, after default and after application for a Receiver, gave to the Trustee an interest in the insurance money.**

This proposition has been very elaborately discussed in the earlier part of the brief, and it would be a waste of time to extend the discussion.

A default had occurred which, under the terms of the mortgage, entitled the Trustee to enter upon possession of the premises, to hold, use and operate the same, to conduct the business thereof, and enjoy the franchises pertaining thereto, and "to collect and receive all incomes, rents, issues and profits of the same and every part thereof."

Under such possession the Trustee would have been entitled to a just allowance for all disbursements and expenses, advances or liabilities made or incurred by it.

After demand that its right to enter upon possession should be recognized, the appellee remained in possession and appropriated to itself the rents, incomes, issues and profits which would have been applicable in the hands of the Trustee to payment for insurance and all other expenses.

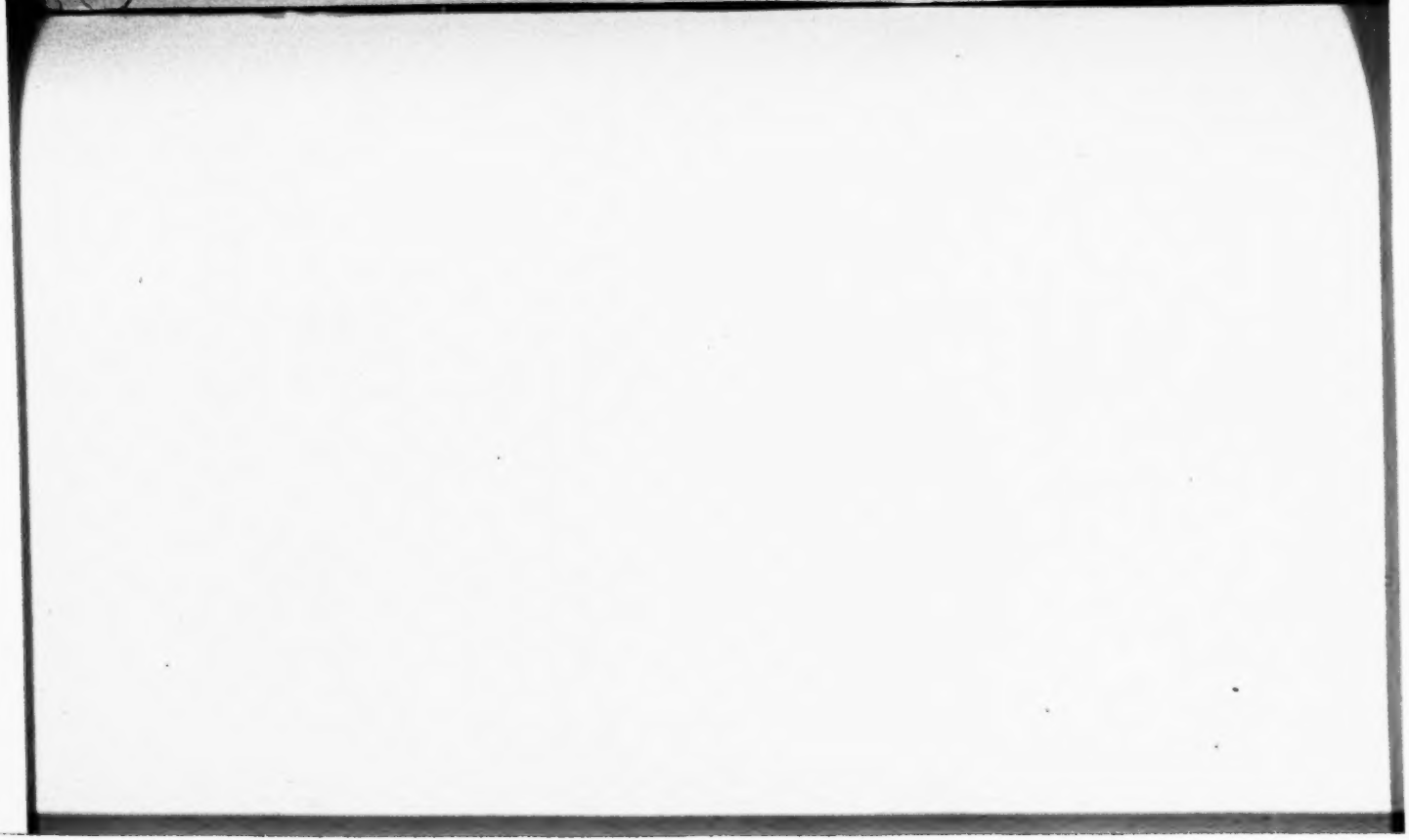
It was the duty of the appellee, which thus

improperly retained possession and appropriated to itself the funds to which the Trustee was entitled, to make such appropriation of the same as would have been made by the Trustee.

In this connection we must not lose sight of the fact that the bond to which we have last referred was given for the purpose of retaining the possession, which enabled the appellee to deprive the Trustee of the revenues which would have enabled it to insure.

**The decree of the Circuit Court of Appeals should be reversed and the case remanded to the Circuit Court for the Western District of Pennsylvania, with directions to execute its original decree.**

JOHN G JOHNSON,
HERBERT B. TURNER,
JOHN S. FERGUSON,
Solicitors and of Counsel for
The Farmers' Loan & Trust Company.



No. 180.

Br. of Schoyer & Carter for Resp.

Filed Nov. 12, 1900.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

FARMERS' LOAN AND TRUST COMPANY,

VERSUS.

PENN. PLATE GLASS COMPANY, et al.

In the Matter of the Application of the Farmers' Loan and Trust Company, for a Writ of Certiorari, to the Circuit Court of Appeals for the Third District.

## BRIEF FOR THE PENN PLATE GLASS COMPANY, IN OPPOSITION TO THE ISSUE OF THE WRIT.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
*Solicitors for Penn. Plate Glass Company.*

IN THE

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## BRIEF FOR THE PENN PLATE GLASS COMPANY, IN OPPOSITION TO THE ISSUE OF THE WRIT.

*A.*

The object of this writ asked for, is to bring into this Court for review, the Decree of the Circuit Court of Appeals for the Third District, which reversed a decree of the Circuit Court of the United States for the Western District of Pennsylvania,

passed in a cause brought into that Court, by a Bill in Equity filed therein by the Farmer's Loan and Trust Company, a citizen of the State of New York, against the Pennsylvania Plate Glass Company, William L. Kann, and the Penn Plate Glass Company, all citizens of the State of Pennsylvania. The jurisdiction of the Circuit Court for the Western District of Pennsylvania was dependent, (using the language of section 6 of the Acts of March 3, 1891, 26 Stat. 826, 827., Ch. 517, establishing the Circuit Court of Appeal) entirely upon the opposite parties to the suit or controversy, being citizens of different States; and the decree therefore, of said Circuit Court of Appeals for the 3d District is by said Act, made final in the said case, subject to the right of this, the Supreme Court of the United States, to require the said Decree to be certified to it for review and determination.

*B.*

This Court has established for its guidance, the principles upon which it acts in disposing of applications made to it for the exercise of the power thus granted, and has thus stated them; that while the power is co-extensive with all possible neccesities, and sufficient to secure to this Court a final control over the litigation in all the Circuit Courts of Appeals, it is a power *to be exercised sparingly, and with great caution.*

Its exercise will be confined to those cases, where its exercise is demanded;

1. For the purpose of avoiding conflict between two or more Circuit Courts of Appeals, or between such Courts of Appeal, and the Courts of a State.

2. In cases involving matters affecting the interests in the United States, its internal or external relations, or, in cases involving other matters of "*pe-*

*culiar gravity and general importance.*"

141 U. S. 507, Lau Ow Bew.
143 U. S. 205, 206, *in re* Woods.
148 U. S. 383, Am. C. Co. vs. Jacksonville R. Y.
166 U. S. 514, Forsyth vs. Hammond.

*C.*

As there can be no claim that the present case comes under either of the first two of the above classes, if the Court grants the writ asked for, it must be because the decision of the case by the Circuit Court of Appeals for the Third Circuit depended upon the determination of some question of "*peculiar gravity and general importance.*"

While of course this Court has not laid down, and could not well lay down, any exact rule for ascertaining whether any particular question comes within the description of questions of "peculiar gravity and general importance," yet we respectfully submit that an examination of the Record and the opinion of the Circuit Court of Appeals will show that there is no reasonable ground for claiming that the decree of that Court rested upon the determination of any question which comes within the class intended by this Court to be described as questions of "peculiar gravity and general importance."

*D.*

Before proceeding to make good this proposition, we call attention to the fact that the petition of the applicant for the writ, as well as the brief in support of it, seems to put in the fore front of the reasons why the writ should be granted, the fact that the district judge who decided the case in the Circuit Court, and one of the Circuit judges who sat in the Circuit Court of Appeals, did not agree with the conclusions

reached by the majority of the judges who sat in the Circuit Court of Appeals.

We respectfully submit that this is an altogether immaterial matter, and that, under the decisions of this Court above referred to announcing the principles which will guide it in granting or refusing writs of *certiorari*, the fate of an application for the writ will depend *on the character of the questions decided*, and not on the unanimity of the judges who sat in the case in which they were decided. Otherwise, instead of this Court exercising the jurisdiction in question "*sparingly*," it would be very constantly exercising it.

*E.*

We understand of course that this Brief is no place in which to show the *correctness of the conclusions reached* by the Court of Appeals, nor to answer the objections made to them in the dissenting opinion; *the only thing we have a right to do* on this application, is to exhibit to this Court, the *nature of the questions* involved, and of the determination of these questions, in order to show that they are not of that character as will warrant the exercise by this Court of its jurisdiction by way of *certiorari*.

The counsel for the petitioner, in addition to the effort made in this petition and the Brief filed in support of it, to show that the case was wrongly decided, file the Brief upon which the case was submitted to the Circuit Court of Appeals.

If it were necessary, (which it is not) to add anything to the answer to these arguments which the opinion of the Circuit Court of Appeals contains, this, as we have said, is not the proper place to do so.

The Record is voluminous, but as the opinion of the Circuit Court of Appeals states with fullness and accuracy the facts out of which the questions determined arise, it will place this

Court in full possession of the case for the purpose of disposing of this motion.

This opinion will be found in 103 Fed. Rep. p. 144 et seq.

*F.*

Before proceeding to explain to the Court the questions raised for the determination of the Court, and determined by it, let us state *in brief outline*, what it is that the petitioner, The Farmers' Loan and Trust Company, the complainant, sought to do in the Courts below, and because it was balked in its effort by the Decree of the Circuit Court of Appeals, seeks the aid of this Court.

(*a*) A plate glass company in the western part of Pennsylvania, called the Pennsylvania Plate Glass Company, in 1891, issued $250,000 of bonds, and secured their payment by a mortagage of its works to the complainant. In this mortgage there was an article relating to the duties of the trustees, and by virtue of its provisions, the trustee claimed the mortgagor company obligated itself, upon the requirement of the trustee, to insure the improvements on the mortgaged property for the benefit of the morgagee.

(*b.*) The mortgagor becoming insolvent in the year 1894, a receiver was appointed by a Court of competent jurisdiction in Pennsylvania, and by order of that Court the mortgaged glass works were sold by the receiver, subject to the lien of the mortgage, to W. L. Kann, and conveyed to him, subject to said mortgage, by deed dated July 1, 1894. He held the property for a year putting improvements upon it, and then in July 1895, conveyed it to a new plate glass company, he and others organized for carrying on the business, called the Penn. Plate Glass Company, the property being conveyed, as he had purchased it, subject to the said mortgage.

(*c.*) In the year 1894, after the property had been purchased by Kann, he insured it for $450,000, a large number

(some 95) companies joining in taking the insurance.

In each of these policies, there was inserted by the insurance Companies, by the direction of Kann, this clause. "*This property is subject to a mortgage for $250,000, but it is distinctly understood that this insurance does not cover the interest of the bond holders.*"

(*d.*) At or about the time in 1894, when Kann purchased and insured the property in the manner above set forth, the said Mortgagee Trust Company notified Kann to insure it for the benefit of the bondholders, and in reply Kann notified it in writing that he refused so to insure said property, and that the existing and all future insurance was and would *be for his own benefit alone, and not for that of the bondholders.*

(*e.*) When the property was conveyed to the Penn Plate Glass Company, in July 1895, it continued in its name the same insurance which Kann had carried, and in each of the 95 policies there was inserted the *same clause as that above quoted from the policies Kann took out.* After the purchase by said company of said property, it received in the year 1895, from the mortgagee trustee, a notice requiring it to insure it for the benefit of the mortgage bondholders. To this notice, the answer was made in writing that the insurance effected by it, was and all future insurance would be only for its own benefit alone, and not for that of the bondholders.

(*b*) The coupons on the mortgage bonds falling due July, 1895 not having been paid, the trustee, under a provision of the mortgage, prior to July, 1st, 1896, declared the whole mortgage debt due, and on that day filed its bill for a foreclosure of the mortgage. At the time the bill was filed, there was no insurance on the property for the benefit of the mortgagee or the bondholders, (unless that taken out by the Penn. Plate Glass Company should be so held,) and no such insurance had been taken out in the interval between the time of Kann's purchase in July, 1894, and the time of said bill filed in July, 1896;

*and the trustee and the bondholders had during all these two years refused to take out any insurance on the mortgage interest,* notwithstanding the notices given by Kann (during his ownership) and by the Penn. Plate Glass Company, above-mentioned.

*G.*

About the time of filing this original bill, namely, in July 16th, 1896, the plaintiff made a motion for the appointment of a Receiver of the mortgaged premises. This was, after argument, refused; but after the Court had announced its decision, counsel for complainant mentioned the fact that there was no insurance on the property for the benefit of the bondholders, and that they would be unprotected in case of a loss by fire, and that the Farmers' Loan and Trust Company was a trustee without funds, and that his clients were entitled to insurance. *Thereupon counsel for defendants expressly denied that either the Penn. Company or Kann was bound to* insure for the benefit of bondholders, either by virtue of anything contained in the mortgage, or the terms of their purchase. Counsel for complainant said they were entitled to insurance, whereupon the Court said: "I can't decide that question," and intimated to defendants that if they were bound to insure they ought to protect the complainant; they denied still that they were bound to insure, but W. L. Kann and Emannuel Wertheimer, (who were stockholders in the Penn Company), agreed to give their *individual* bond or agreement, conditioned that out of the *then* existing policies of insurance which had been previously taken out by the Penn Company, there should be paid an amount sufficient to protect the amount of valid bonds.

*Provided, That it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage, and without pre-*

*judice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain polices of insurance on the said plant, at any time for the benefit of holders of valid bonds secured by the said mortgage, or for the trustee of said mortgage.*

(*h.*) Having taken this bond, accompanied, as above stated with the express denial by the Penn Plate Glass Company, that it was in any way bound to insure for the trustee or the bondholders, and with the above mentioned notice that it would not so insure still in force, neither the trustee nor the bondholders ever thereafter took out any insurance to protect said mortgage interest.

In April 1898, nearly two years after the bill filed, (while the litigation begun by said Bill of Complaint filed in July, 1896 was still pending,) a fire took place which substantially destroyed the Glass works.

(*i.*) At the time of this fire the above mentioned policies taken out by the Penn Plate Glass Company, *exclusively for the protection of its own interest*, were in force, and the 95 insurance companies stood ready to pay the amount of the loss.

The trustee by its supplemental bill in the Circuit Court for the Western District of Pennsylvania, claimed a lien upon this money, for the payment of the mortgage bonds, to the extent of any deficiency in the proceeds of the sale of the mortgaged property.

The said Court appointed one of the directors of the Penn Company receiver, to receive the money, and subsequently, by its decree directed the receiver to hold $125,000 of this fund for the benefit of 90 of said bonds secured by the mortgage, in case it should be decided that the trustee of the bondholders had an equitable lien on the money, (the remaining 160 bonds being owned by said director, who stipulated that the same should not participate in the insurance money.)

(*j.*) It will be seen from the foregoing that for more than three years and a half, (from some time shortly after July, 1894 up to April 1898,) the mortgage trustee and the bondholders, *persistently* refused to take out any insurance to protect the mortgage interest, though notified by the owners of the equity of redemption, that they denied any duty or obligation to protect said interest, and *would not do so.*

That is to say, the trustee and bondholders, claiming as matter of law there was a legal obligation on the part of the owner of the Equity of Redemption to protect the mortgage interest by insurance, perversely and obstinately chose, in the face of the repeated and long continued denial by the equitable owner of any such duty and obligation, to run the risk of the legal point being decided against them, and if it was so decided, and a fire occurred in the meantime, to have *no insurance on their interest.*

And the fire having so occurred, and the Circuit Court of Appeals having decided that said trustee was wrong in its, claims as to the relative rights and obligations of the parties, the Supreme Court of the United States, is asked to exercise its exceptional jurisdiction to review that determination.

Surely there is an *entire absence of any equitable grounds* for asking the Court to take this action it is asked to take. As an excuse for not taking out insurance itself,

The trustee, through its counsel, when the Circuit Court refused to grant a receiver, said it was a trustee without funds, but at the very time whenthis was said, the trustee had filed the bill for foreclosure.

Before filing it, those declaring themselves to be holders of one-third in value of the bonds presented the following to the trustee.

"January , 1896.

*To the Farmers' Loan and Trust Company:*

Default has been made by The Pennsylvania Plate Glass Company on the first day of July, 1895, in the payment of the interest on the bonds secured by the mortgage of that Company to your Company as Trustee, dated January 1st, 1891. Such default has continued for six months after demand made in writing by the Trustee for the payment of such interest. The undersigned, holders of one-third in value of the bonds secured by said mortgage and then outstanding, hereby make and deliver to you their written requisition that you commence and prosecute such action, suits or proceedings, at law or in equity, as shall be necessary to obtain a sale of the mortgaged premises, by and under judicial authority, and to bar and forclose the equity of redemption of the mortgagor Company, its successors and assigns, and of all persons claiming under them. *And the undersigned hereby agree to indemnify and save you harmless from all expenses, costs, outlays, counsel fees or other disbursements which you may incur or become liable for by reason of anything that you may do in carrying out this requisition:* (Record, Vol. 1, page 93.)

There can be no doubt that insurance of the property would have been a proper "*outlay*" in connection with the proceedings for the foreclosure.

But altogether independent of this stipulation, the trustee as soon as the equitable owner, in 1894, denied its obligation to insure, it was the duty of the trustee to notify the bondholders, and request them to put it in funds to take out proper insurance.

And without such notification, or any action of the bondholders, the trustee could have insured the property, and the cost of insurance would have been a lien on the property in its hands, because by Section 10, (Rec. vol. 1, p 35) of the mortgage the trustee, with or without indemnity from the bond-

holders, is authorized "to do anything which in its judgment is proper to be done by it as trustee, and *in such case it shall be compensated therefore from the trust fund.*" And by the same section (vol. 1, p 35, bottom of page) *it is expressly authorized to effect insurance against fire or other damage to any portion of the mortgaged property.*

The *trustee is therefore absolutely without excuse, on the score of want of funds, in omiting to insure.*

Another ground sought to be set up for its failure to insure, and for its being allowed to have a lien on the insurance money received from the policies taken out by the Penn Plate Glass Company, is thus stated on page 6 of the petition.

"The Property being insured to an amount equal to its entire value, and being mortgaged for $250,000, is destroyed by fire, and in its stead remains its entire value in insurance money. The petitioner claims that it is entitled to a decree, such as was rendered by the trial Court below, to the effect that any deficiency that might be found after the sale of what little is left of the mortgaged property, should be paid out of the insurance funds.

If the decision of the Court of Appeals stands unreversed, the Penn Plate Glass Company will profit to a very large extent at the expense of the bondholders by reason of this fire, which will be to them a most fortunate catastrophe. Kann bought the property for $37,500, expended, as he claims, money upon it to increase its cost to him to not more than $83,500, at which last figure the conveyance was made to the Penn Company. Subsequently the Penn Company made improvements, so that the cost to it amounted to $118,000 (Record, vol. 1, p. 483). This property the Penn Company insured for some $450,000, and it proposes to collect the insurance without paying the bonds."

I.

The facts upon this subject ars as follows :

Though this property had cost the mortgagor about $300,000, yet when it went into the hands of the receiver, and was sold, it brought but $37,500. At that time by reason of the want of proper appliances for supplying it with water, fuel, ect., it had little value as an operative plant, (Test. of Kann, Rec. 479, 484.) Subsequently to the purchase by Kann, these defects were supplied, additional land purchased, and the plant put in good order. (Rec. 175.) The total cost of the expenditures made after the purchase including those made by the Penn Plate Glass Co., after its purchase by Kann, was about $200,000. (Rec. 176).

Here, therefore, we have a manufacturing establishment, the cost alone of the ground and plant of which was $500,000. But when it was destroyed it was a *going concern*, its value to its owners was in no way limited to its mere cost ; nor was the loss which would be caused to such owner by the entire practical destruction of such a manufacturing plant as a going concern be inany way measured by the mere *cost* of the plant and buildings.

But we are not dependent for answer to the assertion of the petition that the amount of insurance held by the Penn Plate Glass Company was equal to the *entire value* of the property.

For the ninety-five fire insurance companies whose policies were held by the Penn Plate Glass Company at the time *of the* fire, *contradict this assertion.* For, as above shown, in each one of these policies there was inserted this clause : "*This property is subject to a mortgage of $250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders.*"

Now, as it was only the equitable interest, and not the mortgagee's interest which was insured, it follows that when

each of these companies insured this interest, it was an assertion by them that there was insurable value to the extent of $450,000 in the property over and above the mortgage debt.

There can be no possible doubt that if the trustee had applied to insurance companies for an insurance on the property to the extent of his mortgage interest, which was the first lien on the property, insurance would have been readily granted. If the Penn Plate Glass Company could secure insurance on its interest subject to the mortgage, for $450,000, the trustee could, merely by asking for it, have secured insurance for his $250,000.

3. But even if it were otherwise this Court has decided it to be settled law that an owner of an equitable interest has a clear right to insure the property to its full insurable value, although there may be a mortgage on it equal to its value.

Stinson vs. The Ins. Co., 103 U. S., page 25.

The next ground mentioned in the petition in support of the application for the writ of *certorari*, is to be found on pages 4 to 6, that is to say, that the trustee asked for and was refused a receivership of the property in July 1896, and that the claim to the right to foreclose was kept in litigation till after the fire in April 1898. In reply to this remarkable position, we respectfully refer this Court, to what is said by the Circuit Court of Appeals, in its opinion, (103 Federal Reporter, page 159,); that Court fully considering this claim, in connection with all the facts connected with the acts of the parties connected with the taking out by one, and the failure to take out by the other, of insurance, justly reaches the conclusion, that this contention is "*frivilous.*"

And as we have already shown, the leaving of the Penn Plate Glass Company in possession, in no way interfered with the full and free exercise of the opportunity to the trustee to insure, and for the charge for the insurance, it would have a *first*

lien on the *property*, and the insurance money in case it was damaged by fire.

We wish also to call attention to another statement of the petitioner in its brief (page 3) filed in support of the petition.

After claiming that the fact that the Circuit Court of Appeals ordered a re-argument of the case, shows its "*gravity and importance*" (certainly a most *novel* and remarkable contention) it is said: "To this contention may be added the fact that the bondholders are practically without remedy, and their security almost entirely gone, unless the insurance monies can be applied, as their application as ordered by the decree of the Circuit Court."

In the first place we say in reply that *there is nothing in the record to support this statement*, that unless they are paid out of the insurance money their security is "almost *entirely* gone." For although the works as a *going concern* were substantially destroyed, it does not appear what the real estate and other property not destroyed is worth. And we feel justified in saying that [redacted] $70,000 may be realized from the remaining mortgaged property.

And (2) we further respectfully submit, that even if the bondholders were practically without remedy, "and their security almost if not entirely gone," unless the insurance monies in question can be applied to the payment of said bonds, this is a result, (for the reasons we have heretofore stated,) for which these bondholders have no one to blame except themselves and their trustee. And for a full statement of the facts in support of this assertion, and of what we have said, we respectfully refer to the opinion of the Circuit Court of Appeals. (103 Fed. Rep., 144 to 145, and 157 to 161.)

Having thus shown that there is nothing in the respective attitudes and action of the respective parties to *induce this*

*Court to make an effort to* find ground for exercising the "sparingly exercised" jurisdiction by *certiorari*, we now proceed to explain the questions determined by the Circuit Court of Appeals, and respectfully to claim that there is no ground for any reasonable contention that they can be considered "questions of gravity and general importance," within the meaning of those words as used by this Court.

## I.

*First question determined by the Circuit Court of Appeals.*

From the foregoing statement it appears that as the Penn. Plate Glass Company became assignee of the mortgaged property, subsequent to the lien of the mortgage, and bore no other relation to it, or to the mortgagee, except that which such an assignment created, and as it is not pretended that the Penn Company ever other-wise covenanted or promised directly or indirectly to insure for the benefit of the trustee or bond holders; and as the insurance money claimed by the mortgagee was the proceeds of insurance effected by said assignee on its own sole and exclusive interest in the property,

the only possible claim which the mortgagee could have upon this money must rest for its *basic proposition* upon a covenant in the mortgage on the part of the mortgagor with the mortgagee to insure for the benefit of the mortgagee.

When such basic proposition is maintained, then the mortgagee must go further and show a transfer, in some way, of this obligation to the assignee of the mortgagor.

But the basic proposition must first be maintained. This is a well established and perfectly familiar principle of jurisprudence.

10 Peters 507, Ins. Co. vs. Lawrence.
101 U. S. 442, Wheeler vs. Ins. Co.

2. Accordingly the trustee mortgagee claimed and endeavored to maintain that the mortgage deed of January 1, 1891, does *contain* such a covenant—unless it succeeded in this contention, each and every other contention on its part (whether well or ill founded, when the contention we now speak of is maintained) *necessarily fell to the ground.*

The successs or failure to maintain this basic proposition, depended upon the proper interpretation of a *particular and peculiar provision* of this *particular* mortgage, the nature of which is fully set forth in the opinion of the Circuit Court of Appeals, and should not therefore be herein dwelt upon.

Now the Circuit Court of Appeals reached the conclusion that upon the true and proper construction of the particular and peculiar provision of this particular mortgage it contained no covenant on the part of the mortgagor to insure for the benefit of the mortgagee.

And further determined, as was the inevitable result, that such being the true interpretation and construction of this mortgage, the whole foundation on which any possible claim to the insurance money must rest, was up-rooted, no matter whether the other contentions of the mortgagee would or would not be teneble, if this basic proposition had been maintained.

Having so decided, the Court said it did not wish to rest its determination of the case upon this ground *alone*, and proceeded, (assuming *ex gratia argumenti* that the mortgage *did* contain a covenant on the part of the mortgagor to insure for the benefit of the mortgagee), to decree upon the other contention of the mortgagee, and to decide then adversely to him.

Certainly it would not comport with the proper respect for this Court for us to act upon the assumption that any argument is needed to show that the construction of a particular

and peculiar provision in a particular mortgage is the disposition of a question of peculiar gravity, or of general importance.

## II.

### Second Question decided by the Circuit Court of Appeals.

Assuming now, *ex gratia argumenti* that the mortgage contains a convenant on the part of the mortgagor to insure for the benefit of the mortgagee, did the Penn Plate Glass Company by merely becoming the grantee of the Equity of redemption, subject to the lien of the mortgage, thereby (1) come under *a direct* obligation to the mortgagee to insure for its benefit; or did said Company, by said assignment (2) come under such an obligation to indemnify the mortgagor against the obligation of the latter to insure, as is available to the mortgagee. The Court takes up these first and second questians and decides each of them.

As to (1) —

The Court refers to the well established doctrine recognized and restated by this Court in the case of Wheeler vs. Insurance Company, 101 U. S. 439, that if the mortgagor is bound by convenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien on the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed even although the policy is taken out in the name of the mortgagor, and that the Court will follow this fund into the hands, whether of the mortgagor or his heirs, &c., or the Insurance Company, or into the hands of voluntary assignees of said funds; *but that this result*, as this Court in the case quoted declares, grows out of the contract so made between the mortgagor and mortgagee.

The Court then preceeds to show that this well known doctrine, in no way entitles the trustee mortgage in the present case, to a lien on the proceeds of the Insurance taken out by the Penn Plate Glass Company, because (1) no direct contract was ever entered into between it and the said mortgagee; and, (2) because in the absence of such contract, conveyance of the property to the Penn Plate Glass Company subject to the lien of the mortgage, imposed no obligation on the Penn Plate Glass Company in respect of the convenant to insure, which was a convenant personal to the mortgagor, (a doctrine fully recognized by this Court in 10 Peters, 507, Insurance Company vs. Laurence,) and had been decided to be, and was conceded by counsel for the trustee to be, one not running with the land.

The doctrines thus stated is what have been theretofore decided.

1st. Jones on Mortgages.
Dunlap vs. Avery, 89 N. Y. 597-598.
Reed vs. Mr. Cruner, 91 N. Y. 412.

(2.) The Court then proceeded to decide the question whether the Penn Plate Glass Company, by taking an assignment of the mortgaged property subject to the lien of the mortgage, comes under such an obligation to the mortgagor to *indemnify* it in respect of the contract of the latter to insure, as can be availed of by the mortgagee.

As to this question, the Court holds, that though taking property subject to the lien of a mortgage may be held, as it has been in Pennsylvania, to be equivalent to a contract with the mortgagor on the part of the assignee, to *indemnify* him in respect of said debt, it has been so held only *because* the Courts *had* construed such a transaction as equivalent to an agreement on the part of the assignee with the mortgagor to leave so much of the purchase money as is represented by the mortgage in the hands of the assignee, and

it would be a fraud on his part if he did not pay it to the mortgagee, and thus compel the mortgagor to pay it; but that an implied contract to indemnify the mortgagor in respect of the *mortgage debt* for the reasons so stated, is the full extent of the implication of the contract, from taking the property subject to a mortgage; and that there is no implication of a contract to indemnify the mortgagee in respect of any of the covenants of the mortgagor.

And that moreover it was the doctrine established in Pennsylvania by the decisions of its Supreme Court, that the only obligation in respect to the mortgage debt incurred by the purchaser to the vendor, when the property is conveyed subject to the mortgage, is an obligation to *indemnify* the mortgagor in respect of said debt, and, therefore, if the mortgagor is under no personal responsibility to the mortgagee in respect of the mortgage debt, no obligation arives on the part of the purchaser in respect thereto. 133 U.S. 625

The Circuit Court of Appeals then, again construing this particular mortgage, found that by its terms the mortgagor was expressly exempted from all responsibility in respect of the mortgage debt.

That even therefore if, as had been held in the Circuit Court, the contract to insure was an incident and adjunct to the mortgage debt, and whenever the obligation to indemnify the mortgagor in respect of this mortgage debt was transferred to the assignee the obligation to indemnify him in respect of the covenant to insure was also transferred, there was no transfer here of any such obligation, because there never was any obligation to indemnify in respect of the mortgage debt itself.

H.

Asking this Court now to look back to the summary we have given of the questions determined by the Circuit Court

of Appeals, we respectfully ask how it can with any show of reason, be claimed that the matters so determined are matters of *peculiar* gravity and general importance within the meaning of these words as used by this Court?

Except so far as the interpretation of a part of the provisions of this particular mortgage is involved, do the questions decided belong to any other class of questions than to the class of ordinary questions which arise out of the relation between mortgagors and their assigns and mortgagees which have been the subject of decisions of courts and examination of text writers, time out of mind? If they belong to that class of questions the determination of which this Court will review in its sparingly exercised jurisdiction by way of *certiorari*, may we most respectfully ask, to what class of questions will not this Court hereafter be asked to extend its jurisdiction?

## Third and Last Question Determined by the Circuit Court of Appeals.

## The Alleged Equity of the Trust Company to the Insurance Money.

The Circuit Court of Appeals considered and determined these matters in the concluding part of its opinion (103 Fed, Rep. 157 to 161), beginning with the paragraph: "We come now to consider the complainant's last claim, which is that the SPECIAL CIRCUMSTANCES AND FACTS OF THE CASE, as disclosed in the Record, are such as would make it inequitable for the defendants to deny the relief sought, and that, therefore, the Court should impress a lien in its favor upon the funds which it claims are now in Court, and subject to the Court's disposition."

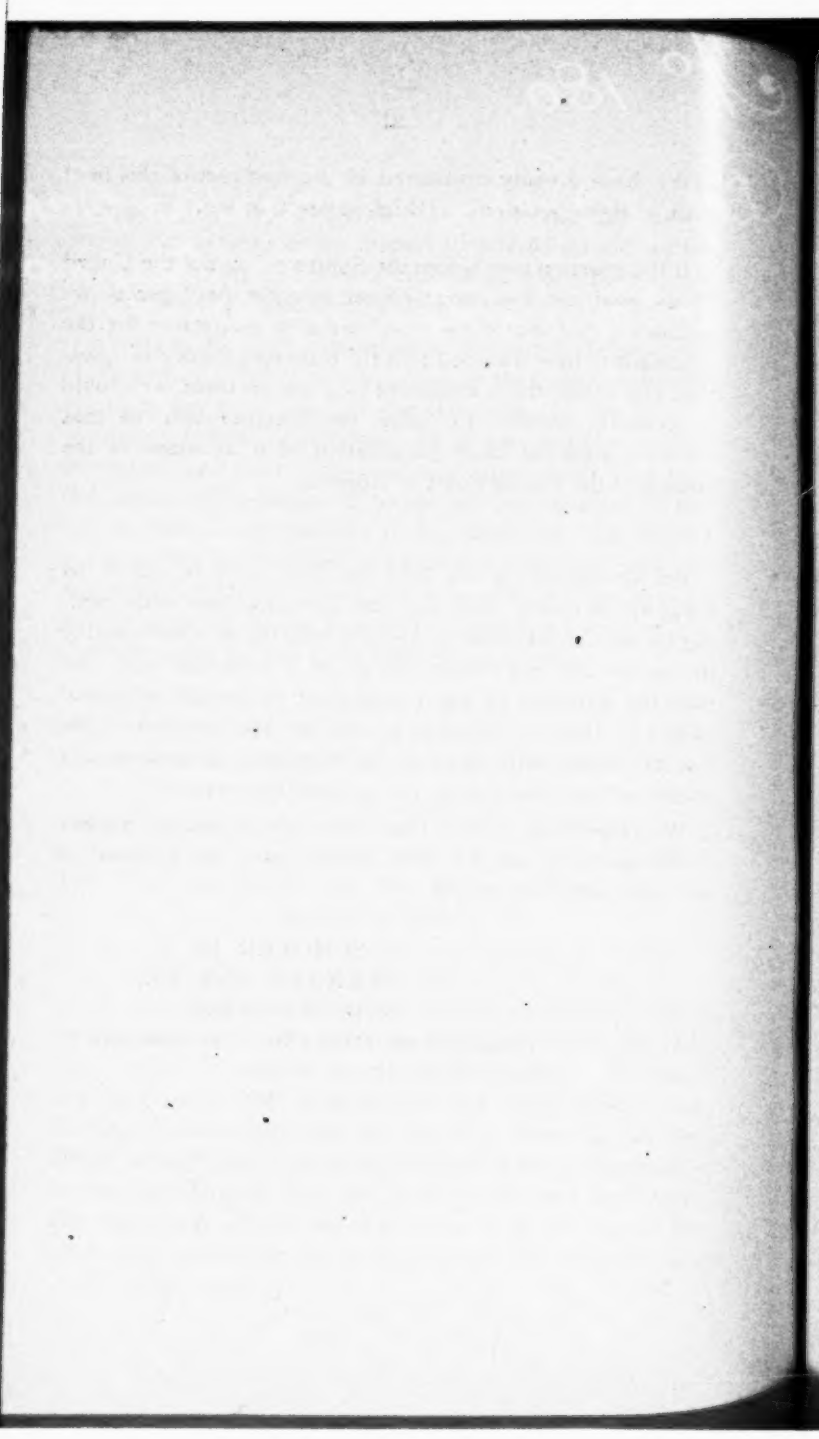
We have already considered in the first part of this brief most of these questions. (Brief, pages 5, et seq.)

If the question now before the Supreme Court of the United States, wasf, *which of course it is not*, whether the "*special circumstances and facts of the case*," make it inequitable for the defendant to have awarded to it the insurance money in question, and entitle the complainant to a lien on them, we should be perfectly content to leave the determination of that question, upon the clear presentation of it as made in the opinion of the Circuit Court of Appeals.

But we respectfully ask, how can this Court be asked, to bring up for review, upon *certiorari*, the correctness of the dealing by the Circuit Court of Appeals, with the question whether the *special facts and circumstances* "*of a particular case*, entitles the defendant or the complainant to certain insurance money? How is it possible to consider the question of the Courts dealing with these *special facts and circumstances*, a matter of "peculiar gravity and general importance?"

We respectfully submit that there can be but one answer to this question, and that such answer must be a denial of any such action on its part.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
*Solicitors for Penn. Plate Glass Company.*



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JAMES H. McKENNEY,
Cl

Brf. of Schoyer, Carter & Scho
For Respondee
Filed Apr. 11, 1902.

IN THE

# Supreme Court of the United States

FOR THE DISTRICT.

*October Term, 1900.*

**FARMERS' LOAN & TRUST CO.** *Plaintiff and Appellent,*

*VS.*

**PENN PLATE GLASS CO. ET AL.** *Defendents and Appellees.*

## Brief for the Penn Plate Glass Co.

**APPELLEE.**

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
For Appellees.

PITTSBURG:
JACKSON PRINTING CO., 341 SECOND AVENUE.
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## Brief for the Penn Plate Glass Co.

**APPELLEE.**

### THE FACTS.

Before proceeding to explain to the Court the questions raised for the determination of the Court, let us state *in brief outline* what the facts of this case are:

First. The Pennsylvania Plate Glass Company (hereinafter called the mortgagor Company) made a

mortgage deed of trust dated January 1, 1891, upon its plant and property to the appellant to secure the payment of $250,000 of its bonds.

Second. The Company having subsequently become insolvent, a Receiver was appointed, by whom the mortgaged property was sold to W. L. Kann, and a deed for it, dated July 2, 1894, made to him by the Receiver. In pursuance of the order of sale, the property was sold *subject to the lien of the said mortgage,* and conveyed to W. L. Kann, *subject to said mortgage.*

Third. Kann held the property until July 1, 1895; on that date he conveyed it to the Penn Plate Glass Company, Defendant, *subject to the said mortgage;* which company remained the owner of it until and on April 12, 1898, when the largest part of the buildings and plant were destroyed by fire.

Fourth. The coupons on the mortgage bonds falling due July, 1895, not having been paid, the trustee, complainant, (under a provision of the mortgage), prior to July 1, 1896, declared the whole mortgage debt due, and on that day filed its bill for a foreclosure of the mortgage.

Fifth. When Kann became the purchaser of the property at judicial sale in 1894 he made contracts of insurance in the aggregate of $450,000, covering only his interest in the mortgaged property and expressly excluding the interest of the bondholders by the following clause contained in all the policies:

"This property is subject to a mortgage of $250,000, 'but it is distinctly understood that this insurance does 'not cover the interest of the bondholders."

Sixth. When the Penn Plate Glass Company purchased the property in July, 1895, it also effected insurances to the same aggregate amount, each of said policies excluding the interest of the bondholders in the phraseology quoted in the last paragraph. Policies were taken in ninety-five companies.

Seventh. While Kann owned the property (from July, 1894, to July, 1895), the mortgagee trustee demanded of him insurance for the benefit of the mortgagee, and thereupon he denied his obligation so to insure, and informed the trustee that he had not so insured, and would not so insure; and the trustee knew he had not so insured while he held the property.

Eighth. Upon the purchase by the Penn Company similar demands and similar refusals were made; and the trustee knew when he filed the bill for foreclosure in July, 1896, that the Penn Company had not insured for the benefit of the mortgagee.

Ninth. About the time of filing the original bill,—namely, July 16, 1896,—the plaintiff made a motion for the appointment of a receiver for the mortgaged premises. This was, after argument, refused.

But, after the Court had announced its decision, counsel for complainant mentioned the fact that there

was no insurance on the property for the benefit of the bondholders and that they would be unprotected in case of loss by fire, and that the complainant, trustee, was a trustee without funds, and that his clients were entitled to insurance. *Thereupon counsel for the Defendants expressly denied that either the Penn Company or Kann* was bound to insure for the benefit of bond holders, either by virtue of anything contained in the mortgage, or the terms of their purchase. Counsel for complainant said they were entitled to insurance; whereupon the Court said: "I can't decide that question"; and intimated to the defendants that if they were bound to insure they ought to protect the complainant. They denied still that they were bound to insure, but W. L. Kann and Emanuel Wertheimer (who were stockholders in the Penn Company), agreed to give their *individual* bond, conditioned that out of the *then* existing policies of insurance which had been previously taken out by the Penn Company, there should be paid an amount to protect the amount of valid bonds

**"Provided that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage * * * * without prejudice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain policies of insurance on the said plant at any time for the benefit of holders of valid bonds secured by the said mortgage or by the trustee of the said mortgage."**

Tenth. On the 12th of April, 1898, nearly two years after the original bill was filed and while the litigation begun by said bill of complaint in July, 1896, was still pending, a fire took place which substantially destroyed the glass works.

Eleventh. For more than three years and a half—from about July, 1894, until April, 1898,—the mortgagee trustee and the bondholders persistently refused to take out any insurance to protect the mortgagee interest, although notified by the owners of the equity of redemption that they denied any duty or obligation to protect said interest and would *not do so;* and consequently at the time of the fire the complainant mortgagee and trustee had no insurance for the protection of the trustee or of the bondholders of said mortgage.

Twelfth. Thereupon the supplemental bill was filed, by which the complainant, mortgagee, claimed a lien upon the said insurance money of the Penn Company, for the payment of the mortgage bonds to the extent of any deficiency in the proceeds of the sale of the mortgaged property; and the Court appointed Emanual Wertheimer receiver to receive the insurance money; subsequently, by its decree, it directed the receiver to hold $125.000 of this money for the benefit of ninety of said bonds secured by the mortgage in case it should be decided that the trustee of the bondholders had an equitable lien on the money, (the remaining one hundred and sixty bonds being owned by the said receiver, who stipulated that the same should not participate in the insurance money).

Thirteenth. In the mortgage or deed of trust, the only provision with reference to insurance is that contained in the following clause: [Article Tenth, Record page ].

**"It shall be no part of the duty of the party of the second part to file or record this indenture of mortgage or conveyance of real estate or of the chattel mortgage or to renew such mortgage, or to procure any further, other, or additional instrument of further insurance or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or of giving notice of the existence of such lien, or for extending or supplementing the same, nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth** *or require the same to be done.* **It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion."**

Fourteenth. The Court below entered a final decree overruling the defenses to the foreclosure of the mortgage, inter alia, and finding that the trustee was entitled to an equitable lien on the said insurance money, and to that decree an appeal was taken by the defendants to the Circuit Court of Appeals of the United States, by which tribunal the decree of the lower Court was reversed.

And from the decree of the Court of Appeals this appeal has been allowed.

## QUESTIONS DECIDED BY THE COURT OF APPEALS.

First. There was not under the terms of the mortgage, an obligation upon the mortgagor arising from express covenant or otherwise, to insure and keep insured, the mortgaged premises for the benefit of the mortgagee.

Second. Even if there was such obligation upon the mortgagor, the Penn Plate Glass Co., becoming the grantee of the equity of redemption subject to the mortgage, did not come under an obligation to insure for the benefit of the trustee, or such an obligation to indemnify the mortgagor against his liability to insure, (if such liability existed), as would be available to the mortgagee and complainant in this suit.

Third. There was no equitable obligation resting on the defendants to insure for the benefit of the trustee, growing out of their dealings with this property, or growing out of exceptional facts or circumstances of the case. In other words, such a special state of facts and circumstances did not exist as would make it incumbent upon a Court of equity to infer a right in the mortgagee to a lien on the insurance, or to impress the fund collected by the

**receiver from the insurance companies with such a lien in favor of the mortgagee and bond holders.**

The language employed in the paragraph of the tenth article of the mortgage above quoted is obviously concerned with limitations on the responsibilties and obligations of the mortgagee trustee and bondholders. The language employed is not contractual as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to its *cestuis que trustent.*

The learned Court of Appeals with great clearness in the opinion of *Gray*, Justice, has fully established the validity of this position, and we can add nothing to the reasons therein given.

## ARGUMENT—PROPOSITION ONE.

**The only basis upon which the mortgagee can claim an equitable lien upon insurance taken out by the mortgagor or his grantee for his own benefit, or in his own name, is some contract, express or implied, to insure for the benefit of the mortgagee; this is the sole basis of the lien; and the mere existence of the lien of a mortgage does not give any right to the insurance.**

## PROPOSITION TWO.

**The equitable principle thus stated can in no way operate to give the trustee under the present mortgage deed, a lien upon the proceeds of the insurance policies taken out by the Penn Company, for no contract, express or implied, was ever entered into by that Company to effect any insurance for the benefit or protection of the trustee, or for the benefit or protection of its cestui que trust.**

Pomeroy's Equity Jurisprudence, 364,365.
Cromwell vs. Brooklyn, 44 N. Y. 47.
Wheeler vs. Ins. Co., 101 U. S. 442.
Nicholas vs. Baxter, 5 R. I. 493, 496.
Carter vs. Rocket, 8 Paige N. Y. 436.

First. The only contract that was ever entered into by any party upon the subject of insurance with the said trustee was that entered into by the mortgagor company by the clause in the mortgage which has been quoted above. The only source of the relation of the Penn Company to the property embraced in said mortgage is the deed made to it by W. L. Kann, dated July 2, 1895.

By this deed the Penn Company acquired all the estate and interest in the property covered by the mortgage, which was left in the mortgagor company after the execution and delivery of said mortgage,—which was the equitable fee simple subject only to the estate and in-

terest vested in the said mortgagee by said mortgagee deed of trust.

Unless, therefore, the acceptance of such a deed operates to transfer to the grantee therein the contract which the mortgagor had made with the trustee upon the subject of insurance, it is indisputable that no such contract has ever existed.

**Second. Assuming ex gratia argumenti, for the present, that the provision in this mortgage deed of trust of January 1, 1891, relating to insurance, operated as a covenant on the part of the mortgagor with the mortgagee, to insure for the benefit of the mortgagee, yet it was not a covenant running with the land, and thereby becoming binding upon the Penn Company as grantee of the mortgagor company.**

*That the contract or covenant made by the mortgagor company with the trustee is not a covenant running with the land is not only clear from the well-known definition or description of such a covenant, but has been expressly decided not to be such a covenant.*

A covenant to run with the land must extend with the land so that the thing required to be done will affect the quality and value or mode of enjoying the estate con-

veyed, and thus constitute a condition annexed or appurtenant to it.

Moreover, it must be one of such a character that the estate will not be defeated or changed by the performance of it. Moreover, a covenant which runs with the land is one under which either the liability to perform it, or the right to take advantage of it passes to the assignee of the land *whether he be named in it or not.* If, therefore, the covenant to insure is one which runs with the land, the covenant upon the subject in the mortgage in question would have bound the Penn Company, although the equity of redemption had not been conveyed to it *subject to the mortgage.*

In view of these principles, it is established that a covenant contained in a mortgage to insure for the benefit of the mortgage, is entirely personal in its character; does not apply to the land or run with it, but is collateral to the remaining covenants, and does not bind the vendee of the equity of redemption.

Platt on Covenants, 3 Law Library, 183.
1st Jones on Mortgages, Sec. 400.
Dunlap vs. Avery, 89 N. Y. 597, 598.
Reed vs. McCrum, 91 N. Y. 412.
1st Biddle on Insurance, Sec. 254.
2nd May on Insurance, Sec. 452.
Carter vs. Rockett, 8 Paigne, N. Y. 436.

These cases are the leading cases on the subject and stand unattacked; and an inspecton of the same will show that they are founded on an overwhelming line of authorities supporting the above proposition.

The case last cited, namely, that of *Carter vs. Rocket*, decides squarely that a mortgagee has no right to the benefit of a policy taken by the mortgagor unless *by virtue of some contract, express or implied;* but that where a covenant to insure amounts to a covenant to *repair and rebuild*, then it runs with the land and is bindng on the purchaser of the mortgaged premises; otherwise not.

But in addition, the foregoing proposition is substantially admitted for counsel for complainant; therefore, inasmuch as even the conveyance of the land to the Penn Company, subject to the mortgage of $250,000, is to be given the same effect as if it had been conveyed subject to the payment of said mortgage, the only effect of this provision is to make the mortgage debt the debt of the Penn Company, as between it and the mortgagor company, and imply a contract on the part of the Penn Company with the mortgagor company to pay such debt, (with such derivative rights in the mortgagee as results therefrom), but does not create any contract with the said mortgagor that the said Penn Company shall be responsible upon the covenant of said mortgage contained in the mortgage to insure the property for the benefit of the mortgagee; and as, therefore, the only way in which the Penn Company could be bound by said covenant for the insurance would be, *not by its own contract,*

but because said covenant is one which the law annexes to the estate conveyed to the Penn Company, and as such is not its nature and therefore is not binding upon the Penn Company, it necessarily follows that the Penn Company has never come under any contract at any time with the mortgagor company to insure the insurable things on the mortgaged premises.

If the covenant to insure, made by the mortgagor company, was one which runs with the land, and so became binding upon the Penn Company, as assignee of the said land, then for the reasons heretofore stated by us, we think the trustee would have a valid claim on the insurance money; and if, by virtue of the deed to the Penn Company, an implied contract had been entered into by it with the mortgagor, to insure for the benefit of the mortgagee, then, we think, though that contract were made with the mortgagor, the mortgagee for the reason set forth by the Supreme Court of the United States in Keller vs. Ashford, 133 U. S., 622 to 625, could avail itself of a contract thus made between the Penn Company and the mortgagor company, *except for the Act of June 12th, 1878, hereafter to be considered*, and for the reasons before stated, we think the mortgagor could maintain a claim upon the insurance company.

But as it has been shown that the covenant for insurance *does not run with the land*, and that the acceptance by the Penn Company of the deed of equity of redemption in the mortgaged property did not in any way *impose any contract* or obligation upon said company to insure said property, and as the Penn Company did not insure said property for the benefit of the mortgagor or

mortgagee, and having the right to insure and having insured, it follows that the mortgagee has no claim upon the insurance money founded on any contract made by the said mortgagor company.

Third. The Court below (the Circuit Court for the Western District of Pennsylvania), conceding the proposition just stated, after holding that the covenants in the mortgage relating to insurance was a covenant on the part of the mortgagor company to insure for the benefit of the mrtgagee, held, (a) that by the acceptance by the Penn Company of the deed for the property it entered into an agreement with the mortgagor company to *indemnify* it against the mortgage debt; (b) that the covenant on the part of the mortgagor company was incidental and supplementary to the mortgage debt; and that the Penn Company in agreeing to indemnify the mortgagor against the mortgage debt, thereby assumed the covenant which the mortgagor had made with the mortgagee to insure, said covenant to insure being incidental to the mortgage debt.

In answer to this contention of the Court below, the appellant submits:

## PROPOSITION THREE.

**The acceptance of the deed of the mortgaged property by the Penn Company subject to the mortgage con-**

stituted no contract on its part either to indemnify the mortgagor against the mortgage debt, or to pay the same.

## PROPOSITION FOUR.

The purchase by the Penn Company and the acceptance of the deed for the mortgage property created no duty to insure for the benefit of the trustees, even if it be conceded that the purchase, subject to the mortgage, constituted a direct assumption and covenant to pay the mortgage debt to the mortgagor which could be enforced by the trustee for its own benefit; in as much as the contract thereby created, if any, was simply to pay the mortgage debt, and this obligation does not carry with it any obligation to perform any of the other covenants in the mortgage.

## PROPOSITION THREE AS ABOVE STATED.

This proposition is to be considered:

First. Independently of the Act of Assembly of Pennsylvania, of June 12, 1878.

Second. As affected by that Act.

First. Independently of the Act of 1878:

*1. Never at any time or anywhere has it ever been held that a deed of the equity in mortgagd property subject to the mortgage imposed any liability on the grantee in respect of the mortgage debt, unless by the terms of the mortgage there is a personal liability on the part of the mortgagor to pay the debt. Whenever a contract has been implied on the part of the grantee, from the acceptance of a deed of land, subject to a mortgage, this implied contract is wholly between the mortgagor and his grantee. The mortgagee is no party to it; and hence his rights are derived from, measured by, and dependent upon the rights of the mortgagor; and therefore, if the mortgagor could not compel the payment of the mortgage debt or the performance of the covenants of the mortgage, neither can the mortgagee.*

"Why should a covenant be inferred from these words, 'subject to the payment of the mortgage,' by the vendee to the vendor to do more than to protect the latter from loss?

"If there is no existing *personal liability* in the "vendor by reason of his bond or promise under "which he can be compelled to pay if the mortgaged "premises prove insufficient, what reason is there

"that he should exact a covenant from his vendee for "the benefit of a stranger?"

If such personal liability does exist, why should he exact more than indemnity? Surely something should appear to create the inference of such a covenant. The words *"under and subject"* import no such thing. They import that the vendee takes the land encumbered and at most that in taking it an agreed consideration which includes the encumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied at the time."

Moores App. 88 Pa. St. Rep. 453.

This principle was confirmed by the case of **Blood** vs. the **Crew Levick** Co. 171 Pa. St. Rep. 328, which decides "that under and subject to the lien of" or "subject to the mortgage" only constitute a covenant *of indemnity* whereby the purchaser agreed to make good any deficiency left by the sale of the land which is thereby rendered primarily liable;

That this liability on the part of the purchaser does not arise until the land has been sold and the mortgagor has been obliged to pay.

And so in the case of Keller vs. Ashford, 135 U. S. 622, 625, in the review of authorities therein cited, the principle is established: It was said:

"Recovery of *the deficiency after sale of* the mortgaged premises against a subsequent purchaser was ad-

judged in a court of equity to a mortgagee not in virtue of any original equity regarding him. He is allowed by a mere rule of procedure to go as a creditor directly against the person *ultimately* liable in order to avoid circuity of action, and save the mortgagor as the intermediate party from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee to which he is permitted to succeed by substituting himself to the place of the mortgagor." 12 C. E. Green, 655, 656.

*2. There never was any individual or personal liability on the part of the mortgagor to pay the mortgage debt or perform the covenants of the mortgage in this case, because by the terms of the mortgage itself, such liability was expressly excluded.*

That provision of the mortgage will be found in Article Fourth of the mortgage, Exhibit A, on page 29 of the record of the original bill, and is as follows:

"It being expressly understood and agreed by and between the parties hereto and by and between the said party of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by said bonds, shall ever be commenced or prose-

cuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of said bonds, or coupons, or of any of them, or by any person or corporation to whom the same, or any of them may be assigned and transferred, except such suits or proceedings as shall be necessary to recover the said premises hereby conveyed, or to subject the same to the payment of said debts; and that the sale of the said mortgaged premises, whether under this power of sale, hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and coupons accompanying the same and of the obligations of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said indebtedness or for a less price; anything in said bond and coupons contained to the contrary hereof notwithstanding."

*But, in addition, no equitable lien can be inferred from the insurance clause, nor any intention to create one even on the theory that the mortgagor covenanted to insure for its benefit, because other remedies are provided for the breach of such covenants, and those remedies are confined to the land and are exclusive of any other remedies, or of any theory of an intention to create an equitable relief.*

The second article of the mortgage gives the trustee the right to enter and take possession of the premises for any default, *inter alia*, in the performance of any covenants, agreement, or stipulation contained in the mortgage. (Record Vol. 1, page 25.)

Or to subject the same to sale. (Record Vol. 1, pages 26, 27.)

To insure its own interest and charge the premiums as liens upon the property and upon the fund. Article 10, Record Vol. 1, pages 34 and 35.

The remedies are restricted to the land and there is an express exemption from any individuality either for the covenants or the mortgage debt. Record Vol. 1, page 19; Art. 4, Rec. Vol. 1, 29.

*Even if there were no express provisions in the mortgage allowing the mortgagee to insure and to make the premiums a charge in the land or fund, still if there was a covenant to insure for the benefit of the mortgage and the mortgagor failed to do so, the mortgagee could insure and charge the premiums to the mortgage and the cost of such insurance would be a proper measure of damages for the breach of the covenant to insure. This was decided in Foster vs. Parker, 5 Grey, 548 and in White vs. Brown, 2 Cushing, 412.*

The remedies being restricted to the land, no personal liability for the mortgage debt or for the performance of any of the covenants in the mortgage can be implied.

"Where there is no personal obligation or covenant in the mortgage to pay the mortgage debt, then the only remedy is against the property mortgaged." 2 Jones on Mortgages, No. 1225.

*3. The very terms of the mortgage having thus provided against any personal liability on the part of the mortgagor company, either in respect of the mortgage debt, or in respect of any of the obligations and covenants therein contained, it necessarily follows, from the foregoing, that the grantee of the equity of redemption can be under no personal obligation either in respect of the mortgage debt or the covenants therein contained.*

*4. Therefore, even if the covenant to insure could be treated as a covenant running with the land in ordinary cases, yet in this case it could not be so considered because if not personally binding upon the mortgagor it could not have been intended to be binding on its grantee.*

**Secondly. Independent of the foregoing, the Act of June 12, 1878, Brightlys Purdon's Dig. 1837, pages 2930; P. L. of Pa., page 205, operates to prevent the conveyance of the property to the Penn Company from imposing any personal liability upon it to the mortgagor company in respect to the mortgage debt, and therefore of necessity excludes any liability on the part of said company to the mortgagee in respect of said mortgage debt.**

That Act is in the following terms:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability; *provided* that the use of the words 'under and subject to the payment of such ground rent, mortgage or other incumbrance' shall not alone be construed so as to make such grantee personally liable as aforesaid.

"The right to enforce such personal liability shall not inure to any person other than the person with whom such agreement is made; nor shall such liability continue after the said grantee has parted bona fide with such encumbered property, unless he shall have expressly assumed such continued liability."

In the latest case decided before the passage of the Act of 1878, namely, Moore's Appeal, 88 Pa., 453, supra, which case, though decided in 1879, interpreted transactions in existence before the Act of 1878, the Court decided, reviewing the whole subject, that an examination of the previous decisions of the Court would show that where the mortgaged property was sold by the holder of the equity of redemption and conveyed to the purchaser, subject to the payment of the mortgaged debt (or as we now assume, subject to the mortgage), such clause has no other effect than

to create a covenant on the part of the grantee with his grantor to indemnify said grantor in respect of the payment of the said mortgage debt, and that for this purpose the grantee thereby, as between himself and his grantor, makes the mortgage debt his own and becomes personally responsible therefor to said grantor; that whenever the grant of the equity of redemption in previous decisions of the Court had been held to create a covenant with the mortgagor to pay the mortgage debt which can inure to the use of the mortgagee, and on which he can sue in his own name, or in the name of the vendor, there had been an agreement to pay the mortgage debt, either expressly or implied, through circumstances.

It will be seen, therefore, that this case decides:

(a) That the words "under and subject" or "subject to the mortgage," created only a contract of indemnity.

(b) That where there is no personal liability on the part of the mortgagor to pay the mortgage debt, no contract whatsoever arises from those words upon the part of the grantee, and there is no liability on him to pay the mortgage debt or perform the covenants of the mortgage.

These same principles were decided by the late case of Blood vs. Crew Levick Co., 171 Pa., 339, which will hereafter be referred to more at length.

But whether the contract with the grantor implied on the part of the grantee of the equity of redemption by taking it in a deed with the clause "subject to the payment of the mortgage debt," or "subject to the mortgage," is to be taken as limited to a contract to indemnify the grantor in respect of the payment of the mortgage debt, as thus authoritatively determined by the Court in its latest decision upon transactions arising prior to the Act of 1878; or as an implied contract with the vendor to pay the mortgage debt, altogether irrespective of the determination in advance, that its payment by the grantee was necessary to save the grantor from loss, as would appear to be the idea entertained by the Court in some of its earlier decisions, is altogether immaterial to the matter which we are now to present. For whether it be one or the other, all the cases without exception hold:

(1) That the liability of the Grantee because of the acceptance of a deed of the equity of redemption, containing the clause in question, arises out of an implied contract.

(2) That the implied contract is one between the grantee and his grantor.

(3) That the contract is that the grantee will be personally responsible to the grantor for the mortgage debt.

Now, what does a contract by the grantee with the grantor, who accepts the deed of the equity of redemption containing the clause in question, that the former will be personally responsible to the latter for the payment of the mortgage debt, mean? It can mean but one thing; and

that is, that he will be personally responsible for the payment of the debt, and thereby he agrees that instead of the land mortgaged being alone liable for the debt, and that for any deficiency arising from its sale the mortgagor shall be alone responsible, the said mortgage debt shall become, to all intents and purposes, as between him and the mortgagor, the personal debt of the grantee; so that, like all other debts which he may owe to anyone, all of his estate and property of every kind and description may be, by due process of law, subjected to the payment of said mortgage debt.

The implied contract for this personal responsibility thus made being one altogether between the mortgagor and his grantee, it necessarily follows that whatever rights the mortgagee has to enforce this contract is altogether a derivative right, and one derived altogether from, and dependent upon, the contract made between the mortgagor and his vendee, to which the mortgagee is no party.

133 U. S., 623-625, above cited.

Second. **The effect of the Act of 1878 is necessarily to abolish any liability of the grantee to his mortgagor in reference to the mortgage debt, except where the grantee has expressly assumed such liability in writing, and such liability as between the mortgagor and his grantee does not arise from the words "under and subject" or "subject to the payment of."**

In the light of the principles of law thus established, let us examine the provisions of section 29 of the Act of 1878.

1. According to these principles, a clear distinction is recognized as existing between the personal responsibility of the grantee to the mortgagor of mortgaged property, arising out of an express contract by the grantee to pay the mortgage debt, and such responsibility arising out of the implied contract declared to result from the acceptance of a deed containing the clause, "subject to the payment of the mortgage," or, "subject to the mortgage." The express contract would, of course, depend for its legal effect on its own terms; and a party entering into such a contract must be supposed to know its effect. But the insertion of the clause, "subject to the payment of the mortgage," had been held to imply, as matter of law, altogether irrespective of what might have been the real intention of the parties in any particular case, a contract by the grantee to become personally liable (the meaning of which has been above explained), to the grantor for the payment of the debt to the extent at least necesary to indemnify the mortgagor.

Now the statute, in language so plain, positive and explicit, that he who runs may read and understand it, declares that as to all future transactions, the Legislature means to inaugurate a new legal policy upon this subject; and thereby to declare that no one taking a grant of the equity of redemption of real estate then subject to a mortgage, shall ever be personally liable for the payment of a mortgage by virtue of any implied contract or agreement; but that in order that he should be so personally liable, he must have made an express contract to that effect, which must be made either by an agreement in writing, expressly assuming a

personal liability for the mortgage debt, or there must be, in the deed itself, express words stating that the grant is made on condition of the grantee assuming such personal liability. And in order to provide against any possibility of any misunderstanding, and with most manifest reference to the course of decision by the Supreme Court of the State, it adds the proviso that the use of the words, "under and subject to the payment of such mortgage" shall not be so construed as to make such grantee personally liable.

2. The Legislature having thus declared its wish that an entirely new legal policy should exist on this subject matter in the future, whose rights are designed to be effected by the new policy as embodied in the statute?

The language of the Act is so clear and plain that it is impossible to understand how there can be more than one answer to the question propounded.

To apply the statute, we must assume the existence of a mortgage, and the parties to it, mortgager and mortgagee, and the proposed sale by the mortgagor of his equity of redemption, and a purchaser willing to buy it.

Intending to provide for such a state of case, the Act declares that a grantee of real estate which is bound by mortgage shall not be personally liable for the payment of such mortgage, unless he shall have made an express written assumption of such personal responsibility in one of the two ways described in the 29th section of the Act.

Now from what does the statute save every such grantee, unless there is the written document described in the statute? He is saved from personal liability for the mortgage debt; that is to say, he is saved from all personal liability for said mortgage debt. Now, how can he be saved from all personal liability for the mortgage debt? To be saved from all personal liability for the mortgage debt, unless there is the written assumption of liability described in the statute, he must, of necessity, be saved from all personal liability to any and every one who, by virtue of his becoming a party-grantee to the said equity of redemption, would have a right to hold him to a personal responsibility for the mortgage debt under the laws in force in Pennsylvania. Now at the time of the passage of this Act, as we have seen, if a grantee of an equity of redemption accepted the deed therefor with the clause "subject to the payment of the mortgage debt" an implied contract was made by the grantee with his grantor to become personally responsible to the said grantor for the mortgage debt, and by his personaal responsibility to indemnify the mortgagor in respect of the mortgage debt (or possibly to pay the same,) and that this contract was a contract only between the grantor and grantee; and if the mortgagee had any rights under it, they were only the derivative rights enforcing the obligation thus entered into by the grantee with his grantor.

**But at all events, the primary liability of the grantee was to his grantor alone, and the whole object of the implication of the contract to pay the mortgage debt, from the insertion of the clause in question, was for the benefit of the grantor of the equity of redemption, in order that he might be saved from being obliged to pay, out of his own estate having parted with his own mortgage estate, the mortgage debt.**

Now, as the only possible way in which the grantee of the equity of redemption can be relieved from all personal liability for the payment of the mortgage debt is that he shall be relieved from all personal liability therefor to all persons who, except for said statute, (assuming that the clause "subject, etc.," to be in the deed conveying the equity) would have had a right to hold him to a personal responsibility for said mortgage debt, it, of necessity follows, that he must be free from personal liability to his mortgagor grantor to whom, as we have seen, his primary liability existed, as well as free from the derivative liability under which he would have been to the mortgagee by virtue of his primary liability to the mortgagor grantor; for it is indisputable that if, without the written assumption of liability mentioned in the statute, the grantee of the equity of redemption still remains liable, personally, to the mortgagor grantor, he is not free from all liability for the mortgage debt; and yet the statute declares that every grantee of an equity of redemption shall be free from all personal liability for the mortgage debt, unless there is the written assumption of liability mentioned in the statute.

It would be ascribing to the Legislature of Pennsylvania the most marvelous ignorance of the plain and obvious meaning of words, to attribute to it an intention to hold the grantee of the equity of redemption still personally responsible for the mortgage debt, merely because there was in the deed of grant the clause "subject to the payment of the mortgage debt"; and only to prevent such grantee from being personally liable to the mortgagee for the mortgage debt, when, by the language in the statute, it is declared that no grantee of an equity of redemption shall be personally liable for the payment of the mortgage unless he makes a written assumption thereof, and that the clause

in question shall not be construed as to make the grantee personally liable; and when the Legislature must have known, when it passed the Act, that the primary liability produced by the insertion of such a clause was that of the grantee to the mortgagor grantor.

It is not conceivable that if the Legislature had any intention of saving the personal liability of the grantee for the mortgage debt to the Mortgage Grantor, it would not have so declared on the face of the Act.

3. This interpretation of the 29th section of the Act, so plainly and irresistibly manifest on the face of the said section, is also made evident by the 30th section of the said Act. For this section declares that the right to enforce such personal liability for the mortgage debt shall not inure to any person other than the person with whom the agreement was made. Now, the right to enforce personal liability mentioned is where there is an express contract in writing on the part of the grantee to assume it,or its assumption is made a condition in the grant, as set forth in the 29th section. Therefore, it is declared that the right to enforce the personal liability, when the assumption of it has been made in writing, shall only inure to the mortgagor grantor if it is made with him. It is clear, therefore, that if the Legislature had intended by the 29th section to retain the implied liability upon the part of the grantee, it never would have thought it worth while to declare that the express contract of personal responsibility, when made with the grantor, should inure only to him.

Therefore, counsel emphatically contend that the Act of 1878 takes away all liability of the grantee to the mortgagor unless there is an express assumption of such liability other than that growing out of the words "under and subject to the payment" and "under and subject to the mortgage."

**4. There is nothing in the decisions which have been cited by the Court below to support its contention that the Act did not apply to the implied contract arising between the mortgagor and his grantee to sustain such contention. They are distinguishable and do not have the effect claimed for them. Those cases are 160 Pa., 193, Lennox vs. Brewer; 171 Pa., 328, Blood vs. Crew Levick Co.; 177 Pa., 606, same parties.**

In the last mentioned case, nothing is said bearing upon this subject other than the declaration by the Court that it approved of the Court's opinion in the case between the same parties, as reported in 171 Pa., page 328. In the case in 160 Pa., 193, the Court had no occasion at all for the decision of the case before it, to determine the true construction of the Act of 1878. All that it says upon this subject is hereinafter stated.

In the case of Blood vs. Crew Levick Co., 171 Pa., p. 328, there was an assignment of the equity of redemption in certain freehold land, and also the assignment of the equity of redemption in certain leasehold land. The action was brought by the executrix of the mortgagor to recover

against the assignee of the equity of redemption of both classes of property to recover the balance of the mortgage debt upon the respective pieces of property remaining unpaid after the sale of the land at foreclosure sale under the mortgages. So far as the freehold land is concerned, it is not necessary to say anything, because the Court found that as to that land there was an express contract on the part of the assignee of the equity of redemption to pay the mortgage debt. As regards the action to recover the balance of the mortgage debt unpaid by the foreclosure proceedings on the leasehold estate, the Court decided that the action could not be maintained because the executrix of the mortgagor had not paid the mortgage money to the mortgagee, which she sought to recover from the assignee of the mortgagor. All that the Court says in reference to the Act of 1878 is as follows:

"The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendee, and for that reason, the Act does not apply (160 Pa., 191, Lennox vs. Brower.)"

"So far as the mortgage on the freehold is concerned, this is an action by the vendor against his vendee, upon an express contract."

"So far as the mortgage on the leasehold is concerned, the action is upon the implied covenant. The trouble does not grow out of the Act of 1878, but out of the fact that as to the mortgage on the leasehold, the implied covenant does not seem to have been broken."

By the latter expression the Court means and explains that the mortgagor not having paid the mortgage had no right of action against the grantee of the equity of redemption. There can be no doubt, of course, that the Court does hereby declare that the action could have been maintained by the executrix of the mortgagor if she had paid the mortgage debt, and that action would have been maintained on the implied covenant to idemnify the mortgagor grantor, which was contained in the deed of assignment of the equity of redemption, in which deed the property was conveyed to the grantee, "subject to the lien of the mortgage." And the Court does also place its opinion upon this subject upon the case in 160 Pa., 191, declaring, in effect, that as the action was not by the holder of the mortgage to assert a personal liability against the vendee, the act of 1878 did not apply to the transaction.

But it will be found that the case in 160 Pa., 191, in no way decides that the only effect of the Act of 1878 is to prevent a mortgagee from having a claim against the grantee of the equity of redemption upon the personal liability of the latter for the mortgage debt. Upon the contrary, the Court in that case decided that the Act of 1878 had no application to the suit of the plaintiff in that case, because it was a suit by the vendor of certain property to recover of his vendee the unpaid balance of the purchase money of certain property, which had been agreed to be paid by the vendee to the vendor.

The Court said:

"This is not a suit by the holder of a mortgage against a

grantee who had bought "under the subject," and whom this Act was meant to protect, or by the holder of a discharged mortgage who was attempting to hold the grantee liable on his mere promise to pay. The suit was by the grantor for for the unpaid balance of the purchase money, and consequently the Act of June 12th, 1878, had no application, and no question of validity of the promise to a third party or the right of such party to enforce an agreement made for his benefit arose in the case."

Now it will be observed that the Court says as its reason for the non-application of the Act of 1878 to the case that the suit was neither (1) one by the holder of a mortgage against the grantee; nor (2) was it a suit by the holder of a discharged mortgage who was attempting to hold the grantee liable on his mere promise to pay.

The holder of a discharged mortgage in the opinion referred to could only be the mortgagor, because he alone, except the mortgagee, would be the person to have discharged the mortgage; and the Court could not have referred to the mortgagee when speaking of the holder of a discharged mortgage, because the Court had already spoken of a suit by the holder of the mortgage, that is, the mortgagee. There is nothing, therefore, in this case inconsistent with what we have above said to be the single and necessary construction of the Act of 1878; that is to say, when there is no written assumption, it relieves the grantee of the equity of redemption from liability for the mortgage debt against every one who, but for such Act, could have maintained that liability by virtue of the acceptance of the deed containing the clause in question.

Now, although, as we have said, the Court in the case in 171 Pa., 328, when it refers to the case in 160 Pa., speaks of it as if it had decided that the Act does not apply unless the action is brought by the holder of the mortgage to assert a personal liability against the vendee, it is manifest that this is a misconception of what the Court did decide in the last mentioned case.

Moreover, the declaration now being referred to by the Court in 171 Pa. was in no way necessary to the decision of that case; for the Court decided altogether, irrespective of the Act of 1878, that the suit of the plaintiff against the assignee of the equity of redemption of the leasehold estate, could not be maintained upon the implied contract arising from the acceptance of the deed with the clause in question in it, because the plaintiff, the executrix of the mortgagor, had not paid the mortgage debt, to recover which the suit was brought. Therefore, even if the Act of 1878 did not apply to the case, the plaintiff could not recover. So far as the action grew out of the sale of the freehold estate, the court found that there was a special written agreement to pay the mortgage debt on the face of the assignment, and treated that as an agreement to become personally responsible for the mortgage debt, so that even if the Act of 1878 did apply to said assignment, under the Court's construction of said assignment, the assignee was personally responsible.

Counsel submit, therefore, that it is very apparent that the Court in this case could not have brought to bear upon the provisions of the Act of 1878, its judicial mind to an extent necessary to appreciate the plain and obvious and indisputable effect of its clear language. For it is incon-

ceivable to the legal mind, that if it had done so, it could have reached the conclusion that the grantee of the equity of redemption continued, notwithstanding the Act of 1878, to be under a personal liability for the mortgage debt, without the written assumption provided for in that Act and merely because the assignment deed contained the clause "subject, etc.," when the Act expressly declares that such clause shall not affix any personal responsibility upon the assignee, and therefore, of necessity, declares that no one shall have a claim for such personal responsibility by virtue of said clause.

**5. But in no event is the case of Blood vs. Crew Levick Company, 171 Pa. 328, or the case in 160 Pa., 191, upon which the decision is based, binding upon the United States Courts in this case.**

Even if counsel are mistaken in the position which they have taken with reference to the case last mentioned, the decision of the Supreme Court of Pennsylvania herein is not binding upon the United States Court in this case, for the rule upon this subject as firmly adopted by the Supreme Court of the United States is that the Courts of the United States, in the administration of state laws in cases between the citizens of different states, have an independent jurisdiction co-ordinate with that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws.

Where, however, by a course of decisions of the State Courts certain rules are established which become rules of property and action in the State, and have all the effect of law, especially with regard to the law of real estate and the construction of state statutes, the Courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the United States Courts to exercise their own judgment; and when contracts and transactions have been entered into, and rights have accrued thereon, at a time when there has been no decision upon the statutes involved, the Courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State Courts after such rights have accrued.

Burgess vs. Seligman, 107 U. S., p. 20.
Carroll County vs. Smith, 111 U. S., p. 563.
Boles vs. Brinfield, 120 U. S., 763.

The case in 171 Pa. was not decided until October, 1895; the deed of the equity of redemption to the Penn Company was made in July, 1895; therefore, the contractual rights of the Penn Company were established, and its obligations established, before the decision of the Supreme Court of Pennsylvania referred to; and therefore, this decison is not binding upon the United States Courts in this case.

Although the case of Lennox vs. Brower, 160 Pa., 191, was decided before July, 1895, having been decided in March, 1894, it did not, as we have above shown, put any construction upon the Act of 1878 inconsistent with what we have said is inevitably its true construction. But even if counsel could be mistaken in this, such single decision would not, under the cases which we have above cited, be binding upon the United States Courts in this case, in the face of the plain meaning of the statute.

That this is true also appears from the following:

We have said above that it would appear from one part of the opinion of the Court in the case of 171 Pa., 328, as if the Court thought that, notwithstanding the Act of 1878, the rights of the assignee of the equity of redemption and its obligations as between such assignee and the mortgagor grantor under a deed of the equity of redemption containing the clause, "subject, etc.," were the same since the passage of the Act of 1878 as they were before its passage; but in another part of the opinion in describing the obligations of the assignee of the equity of redemption, the Court deciares that the legal import of the "under and subject to the lien of" clause in such a deed is that the vendee will discharge the lien of the incumbrance by payment, or in default thereof, that the land shall remain liable therefor and shall be as between himself and his vendor primarily liable to the extent of its actual value; and if the mortgage money is more than the value of the land, the vendor will be liable for his creditor, that is the mortgagee, for such surplus, but will be without recourse to his vendee for the amount so paid.

Now certainly this is a very different extent of liability on the part of the vendee of the equity of redemption than that which had been determined to be his liability by the decisions of the Suprehe Court of Pennsylvania, which we have quoted, anterior to the passage of the Act of 1878; for, by those decisions, it had been determined that as between the vendor of the equity redemption and his vendee, where the deed contained, the "subject, etc.," clause, the vendee was personally responsible, that is, responsible in the whole of his estate of every kind for any deficit which would exist between the value of the land as ascertained, in the only way it could be ascertained, that is, by a sale, and the amount of the mortgage debt.

Therefore, if the Court in 171 Pa., 378, decides that the vendee of the equity of redemption under a deed containing "the subject, etc.," clause, is only responsible to the vendor to the extent of the value of the land, which value could only have been ascertained by a sale, it is very certain that the Court has determined that there is no personal responsibility in the proper sense of the term, since the passage of the Act of 1878, on the part of the vendee of the equity of redemption, even to his vendor, under an assignment which has not an absolute stipulation to pay the mortgage in it, but only has "the subject, etc.," clause.

Counsel is bound to confess that the case now being referred to is one which is certainly inconsistent in its several parts and is one which cannot be followed by the United States Courts.

**6. If because of the absence of written assumption of personal liability for the mortgage debt mentioned in the Act of 1878 or otherwise, the Penn Company never was under any personal obligation to the mortgagor company to pay the debt, then the whole foundation upon which the right of the mortgagee to enforce a personal obligation against the Penn Company fails, and all possible claim upon the part of the mortgagee against the Penn Company growing out of the assignment of the equity of redemption in the mortgaged property, is at an end.**

If counsel are right in the interpretation which they have placed upon the Act of 1878, namely, that in the absence of a written assumption of a liability, the grantee is not liable even to the mortgagor, then all possible foundation, even upon the line of reasoning pursued by Judge Buffington in his opinion for any claim upon the insurance money by the mortgagee in this case is entirely taken away; for the only claim which by possibility could be maintained by the mortgagee for the insurance money would be founded upon the following propositions:

1. That the deed of assignment of the equity of redemption to the Penn Company with the clause in question inserted therein operated as a contract upon the part of the Penn Company with the mortgagor company to be personally responsible for the mortgage debt.

2. That although no contract was thereby made with the mortgagee by the Penn Company, yet upon established principles of equitable jurisdiction, the creditor is entitled

to all the collateral securities which the debtor has obtained to reinforce the primary obligation. The purchaser of land subject to a mortgage, who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624-625.

Fuller vs. Hughes, 12 N. Y. 79.

It, of necessity, follows, therefore, that if because of the absence of the written assumption of personal liability of the mortgage debt mentioned in the Act of 1878, the Penn Company never was under any personal obligation to the mortgagor company to pay the debt, the whole foundation upon which the right of the mortgagee to enforce a personal obligation against the Penn Company fails, and all possible claim upon the part of the mortgagee against the Penn Company, growing out of the assignment of the equity of redemption in the mortgaged property is at an end. For no one, of course, could be found to claim that if the Act of 1878 denies to the mortgagor any claim for personal responsibility of the assignee of the equity of redemption,

without a written assumption of that personal responsibility for any portion of the mortgage debt, the said mortgagor could have no claim by virtue of the assignment "subject, etc.," against the assignee to compel him to respond to the covenant for insurance for the benefit of the mortgagee or for the benefit of the mortgagor. Every one would, of course, admit that if it was the intention of the Act of 1878 to relieve the assignee of the equity of redemption of all personal responsibility for the mortgage debt without the written assumption required by the Act, there necessarily went with that denial of responsibility on the part of the assignee, any responsibility for the performance of the other personal covenants contained in the mortgage including the covenant for insurance. And, indeed, the whole contention of Judge Buffington for the liability of the Penn Company as assignee of the equity of redemption to insure for the benefit of the mortgagee, is based upon the proposition that the duty to insure was incidental and supplemental to the mortgage debt.

Now, while it is not true that the obligation to insure necessarily followed an assumption of the mortgage debt, no one will pretend that there could be any obligation to insure on the part of the assignee of the equity of redemption, if he is entirely free of any personal obligation to pay the mortgage debt; and if the only remedy for the payment of the mortgage debt after an assignment of the equity of redemption, either on behalf of the mortgagee or mortgagor, is a resort to the land mortgaged.

Now, there can be no doubt that if the Legislature, by the Act of 1878, intended, as we have shown it did intend, to relieve the assignee of the equity of redemption of all personal liability in connection with the mortgage, in the ab-

sence of the written assumption, the only resort which the mortgagee or mortgagor could have for the payment of the mortgage debt, was a resort to the property mortgaged.

**7. But independently of the Act of 1878, the Supreme Court has decided and it is established law, that if there is no personal obligation on the mortgagor to pay the mortgage debt, there is none upon the grantee and therefore no implied contract to pay the same arises.**

This was held, first, in the case of Moore's Appeal, 88, Pa., 453, where the Court in deciding the above principle, said:

"Why should a covenant be inferred from these words, that is, 'subject to the payment of the mortgage' by the vendee to the vendor to do more than to protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant of his vendee for the benefit of a stranger? If such personal liability does exist, why should he exact anything more than indemnity? Surely something should appear to create the inference of such a covenant. The words, 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most, that so taking it, at an agreed consideration, which include the incumbrance, he will indemnify the vendor to the extent of

that consideration, in the same manner as if it had been paid in cash and so applied at the time."

This principle was confirmed by the case of Blood vs. The Crew Levick Company, 171 Pa., 328, which decide that "under and subject to the lien of," or "subject to the mortgage" only constitute a covenant of indemnity, whereby the purchaser agrees to make good any deficiency left by the sale of the land, which is thereby rendered primarily liable:

That this liability on the part of the purchaser does not arise until the land has been sold and the mortgagor has been obliged to pay.

It therefore follows that this case decides that if there is no personal liability on the part of the mortgagor that there never can be any assumption of the mortgage debt or liability to pay on the part of the grantee.

It therefore follows that, inasmuch as it has been shown that the rights of the mortgagee are derived solely and simply from the contract of the mortgagor, that the mortgagor was not personally liable for the mortgage debt or the covenants, the grantee cannot possibly be so liable. And counsel for defendant call to the attention of the Court the fact:

**That there never was any individual or personal liability on the part of the mortgagor to pay the mortgage debt or perform the covenants of the mortgage in this case, because by the terms of the mortgage itself, such liabilty was expressly excluded.**

That provision of the mortgage will be found in Article Fourth of the mortgage, Exhibit A, on page 29 of the record of the original bill, and is as follows:

"It being expressly understood and agreed by and between the parties hereto and by and between the said party of the first part, and by the respective holders of the said several bonds collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by said bonds, shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors, or shareholders, either by the said holders of the said bonds, or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned and transferred, except such suits or proceedings as shall be necessary to recover the said premises hereby conveyed, or to subject the same to the payment of said debts; and that the sale of said mortgaged premises, whether under this power of sale hereby granted or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and the coupons accompanying the same and of the obligations of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said bond and coupons or therein contained to the contrary hereof notwithstanding."

The contention of Judge Buffington in regard to the effect of this clause is that the clause only provided for the discharge of an existing liability on the part of the mortgagor did he sell; and that if the sale had not taken place, the personal liability of the mortgagor company for the mortgage debt still existed, and that the covenant to insure

created a personal liability on the part of the mortgagor for the mortgage debt.

This position is manifestly untenable. If, as is provided in the foregoing clause, no suit can be maintained to enforce an individual liability, it is manifest that no personal liability can exist and the mortgagor can never be called upon to pay the mortgage debt.

The invalidity of the contention that the covenant to insure, in the face of this direct provision that there should be no individual liability, constituted a liability on the part of the mortgagor requires no argument.

It has therefore been demonstrated that there was no liability on the part of the Penn Company to pay the mortgage debt or perform any of the covenants of the mortgage, because the Act of 1878, exempted it from any such liability; and, assuming that it did not, the mortgage itself expressly excludes any liability on the part of the mortgagor, and consequently on the part of the grantee to the mortgage.

Judge Buffington, in his opinion, held that the Act of 1878, did not apply to the present case for the following reasons:

In support of the argument contained in the above referred to portion of our brief, that upon the true construction of the Act of 1878 it operates as well on the question of liability of the grantor to the mortgagor as to the liability to the mortgagee, we refer the Court

(as decisive of the correctness of our contention), to the recent case of

*Wunderlich vs. Sadler,* 189 Pa. 469.

In that case, in a statement of action filed, the allegation was that the deed contained the following language, to wit:

"Subject also to the mortgage (then follows description and record of mortgage), all of the above mortgages being assumed by the said parties of the second part hereto as a part of the consideration herein named."

The statement did not show whether the assumption was a clause in the deed, or was an oral agreement, or was contained in a collateral written agreement. The record of the deed was referred to in the statement and made part thereof. The affidavit of defense denied the making of any promise or agreement of liability for the mortgage. Held:

(1.) That if it was an oral agreement, it was void under the Act of June 12, 1878, P. L. 205.

Thirdly. But even if it should be conceded for the sake of the argument that the foregoing construction of

**the Act of 1878 made by Counsel for the appellee is not the true one, and conceding that all the act intended to do was to prevent any personal liability for the mortgage debt to the mortgagee, unless there was a written assumption of liability required by the Act, and that the Act did not affect the liability of the Penn Company to the mortgagor for the mortgage debt, still the mortgage trustee has no claim upon the insurance money in this case.**

Judge Buffington, in his opinion in the Circuit Court, held that the Act of 1878 did not apply to the present case, for the following reasons:

That the Act simply abolished the direct liability of the grantee to the holder of the mortgage which some cases had previously held to exist by virtue of the "under and subject to the payment" clause, and left unaffected and untouched the previously existing implied covenant arising therefrom on the part of the grantee to indemnify his vendor against the mortgage debt.

That because the implied liability of the grantee to indemnify the vendee was left unaffected, therefore the act did not apply to a case where the holder of the mortgage was not trying to hold the grantee on a direct assumption, but was endeavoring to enforce this liability against him as surety of the vendor mortgagor (the latter being insolvent), and the holder of the mortgage claiming through and under the mortgagor.

This contention is utterly invalid, because, in the first place, this is a direct action by the mortgagee to enforce the alleged liability of the grantee arising from his purchase of the mortgaged premises subject to the mortgage; and even if it be assumed that the mortgagee is seeking to enforce this liability through the rights derived from the mortgagor, it is none the less a fact that this is an action by the holder of the mortgage to enforce a liability against the grantee arising from the purchase by the grantee subject to the mortgage; and there is no authority that holds that in such case the Act of 1878 does not apply and this appears equally from the following:

If the assignee of the equity of redemption is to be under no personal liability to the mortgagor for the mortgage debt, it is absolutely certain, for the reasons hereinbefore stated, that it could not have been the intention of the Legislature, while freeing him from any personal liability for,—that is to say, from any obligation to pay,—the mortgaged debt, which mortgage debt is the main thing in the mortgage, the assignee was to be left under a personal obligation for a subordinate covenant in the mortgage; that is to say, the covenant of the mortgagor to insure. As has been said heretofore, the statement of this proposition is all that is needed to command assent to it.

Now this being true, as the statute has declared, when applied to the case of the assignnment to the Penn Company, that the mortgagee trustee shall have no claim against the Penn Company either in respect of the payment of the mortgage debt or the obligation of the mortgagor company to insure, it necessarily follows that the mortgagee trustee can have no claim upon any of the

estate or assets of the Penn Company other than a right to sell the mortgaged property and apply the proceeds of the sale to its mortgage debt.

Now, as the insurance money is an asset, or property of the Penn Company, the mortgagee trustee has no other claim to this asset or property than it would have to horses, or plate glass made by the company, or any other article belonging to said company.

Even if it be admitted, therefore, that the mortgagor company by reason of the fact that upon the construction of the Act of 1878, which we are now assuming to be the true one, could maintain an action against the Penn Company upon its covenant to insure, or for the amount of the mortgage debt, because the personal liability of the Penn Company to the mortgagor company remains to all intents and purposes just as if the Act of 1878 had not been passed, *yet, as that Act declares that the mortgagee shall have no right to enforce any personal responsibility against the Penn Company,* there is no foundation for its claim for this insurance money.

For if it should be held as Judge Buffington held, that the mortgagee company has a right to this insurance money by virtue of the contract made by the Penn Company with the mortgagor company, that because the mortgagor company would have a right to enforce against the Penn Company the performance of the contract thus entered into between the Penn Company and the mortgagor company, the provision of the Act of 1878, which declares that the *mortgagee* shall have no rights growing

out of the personal liability of the assignee of the equity of redemption would be rendered entirely nugatory.

For we have seen before the Act of 1878 the only right which the mortgagee company ever had against the assignee of the equity of redemption was the right to enforce the contractual obligation entered into between the mortgagor and its, or his, vendee, arising out of the acceptance by the vendee of the assignment containing the clause in question. Now if, notwithstanding the fact that the Act of 1878 declares that without the written assumption of personal liability the assignee of the equity of redemption shall be under no personal liability in respect of the mortgage to the mortgagee, the latter may enforce the personal liability which remains, notwithstanding the Act of 1878, on the part of the assignee to the mortgagor, the mortgagee has precisely the same rights against the assignee of redemption that he had before the passage of the Act of 1878; and yet if we lean on the assumption of the construction of the Act which we are now making, it was the intention of that Act to take away all right upon the part of the morgagee to enforce any personal liability of any kind upon the part of the assignee of the equity of redemption to the mortgagee unless there was the written assumption mentioned.

If, therefore, there can be no possibility of claim by the mortgagee to the insurance money, except through the existence of a personal liability on the part of the Penn Company, enforceable for the benefit of the mortgagee, it necessarily follows that it has no claim upon the insurance money.

## PROPOSITION FOUR.

**The purchase by the Penn Company and the acceptance of the deed for the mortgaged property, created no duty to insure for the benefit of the trustee, even if it be conceded that the purchase subject to the mortgage constituted a direct assumption and covenant to pay the mortgage debt to the mortgagor, which could be enforced by the trustee for its own benefit; inasmuch as the contract thereby created, if any,was simply to pay the mortgage debt, and this obligation does not carry with it any obligation to perform any of the other covenants of the mortgage.**

(a) To determine the question of the effect of such a deed and of the purchase subject to an existing mortgage, it is necessary to ascertain in the first place from the decisions of the Courts what is the relation and what is the obligation which was created as between the mortgagor company and the Penn Company by the acceptance by the latter of the conveyance of said mortgaged property, subject to said mortgage.

(b) Inasmuch as the land affected by the mortgage, deed of trust and the several subsequent deeds, and the subject of the contracts entered into by the respective parties whose rights are the subject of this suit, is in Pennsylvania, where also the suit is brought, the law of that State governs in expounding and enforcing the contract.

Mills vs. Allen, 133 U. S., 423.
Taylor vs. Wood, 135 U. S., 312.
Union L. I. Co. vs. Hanford, 149 U. S., 190.

(c) By some of the decisions of the Supreme Court of Pennsylvania, made before the passage of the Act of June 12th, 1878, hereinafter referred to, it was held that where a mortgagor sells his equity of redemption, and in the deed to his grantee conveyed the property to him subject to the payment of a described mortgage, the acceptance of such a deed was an assumption by the grantee of the mortgage debt, which assumption by the grantee made the debt the grantee's own debt as between him and the grantor, and that upon his failure to pay it when due, an action would lie against him in the name of his grantor for his own benefit or for the use of the mortgagee, or by the mortgagee in his own name, to recover the amount of the mortgage debt, even if the mortgagee had not himself paid the mortgage debt.

Such would seem to be the effect of the decisions, among others, in 3 Watts, 60, Campbell vs. Schrum; Blair vs. Gorman, 5 W. & S., 42; Woodbury's Appeal, 38 Pa., 326.

This doctrine has been somewhat modified by the later decisions in Pennsylvania, namely, Blood vs. Crew Levick Company, 171 Pa., 328, where it is decided that where the mortgagor conveyed his equity of redempton to the purchaser thereof, subject to the lien of the mortgage therein described, the mortgagor cannot maintain any action against his grantee until he has paid the mort-

gage debt or some part thereof, and then only for the part so paid.

The same principle was probably foreshadowed by the Court in Moore's Appeal, 88 Pa., 452-453.

(d) But up to this stage of the argument, without in any way relying upon the last mentioned proposition or upon the effect of the Act of Legislature of June 12th, 1878, and assuming and considering for the time being that the obligation of the Penn Company under the grant to it of the equity of redemption are those set forth in the decisions first above referred to, let us see what effect this ascertainment of said obligations have upon the right asserted by the trustee to a lien upon the insurance moneys.

(e) And in answering this question, counsel also assume and concede for the time being that in Pennsylvania the grant of the equity of redemption of mortgaged property, subject to a described mortgage, has the same legal effect upon the rights of the parties as if the grant was subject to the *payment* of the described mortgage. We do this because, while in other jurisdictions it is held that the conveyance of property subject to a mortgage, without more, imposes no personal obligation upon the grantee to pay the debt, the conveyance of the property mortgaged, subject to the *payment* of the debt, does impose that obligation; and while in all the cases to which we are now referring, the clause in the deed was "subject to the payment of the mortgage," or equiva-

lent words, and while in the case of Kerns vs. Tanner, 13, S. & R., 97, the Court denied that the conveyance of the property with the clause, "subject to the mortgage described," imposed the personal responsibility, yet in the case in 171 Pa., 328, above referred to, the clause was "subject to the lien of the mortgage"; and, moreover, judging from the language used in the opinion of the Court, in the earlier cases to which we are now referring, it would seem that the Court treated the two forms of expression as equivalent.

(f) We assume, then, for the time being, that when the equity of redemption in the property covered by the mortgage of January 1st, 1891, was conveyed by the Penn Company, subject to the $250,000 mortgage, there was an assumption by the latter company of said mortgage debt, which, as between it and the mortgagor company, became the debt of the Penn Company, and that the mortgagee could sue the Penn Company in the name of the mortgagor company, or in its own name, for the mortgage debt when the latter became due.

(3) This being conceded, counsel for defendant submit:

(a) That the implied contract arising from the words, "subject to the mortgage," "subject to the payment of the mortgage," and "subject to the lien of the mortgage," is simply and solely a contract to pay the mortgage debt.

(b) That this implied contract can have no greater or other effect than the express contract to pay the mortgage debt.

(c) That even an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage;

(d) Except those which run with the land, and these are binding on the purchaser, irrespective of any contract to pay the debt.

(e) That the contract to insure does not run with the land, and therefore the obligation to pay the mortgage debt imposes no obligation to insure.

(4.) It will be thus seen that the implied contract evidenced by the words "subject to the payment of the mortgage debt," or "subject to the mortgage," or "subject to the lien of the mortgage," is simply and solely a contract to pay the amount of the mortgage debt as money and to do nothing else, and this appears from the nature and reasons for the principle that the taking by the grantee of a grant of the equity of redemption in mortgaged property subject to the payment of the mortgage debt.

The reasons and grounds therefor are as follows; as recognized by the decisions of Pennsylvania, namely:

That when the grantor and grantee enter into an arrangement for the sale by the former to the latter of property covered by a mortgage, and agree that it shall be conveyed to the grantee subject to the payment by him of an existing mortgage debt; the amount paid to the grantor by the grantee is only a part of the price agreed upon between them as the purchase price for the property bought, the remainder of said purchase price being the existing mortgage debt; and the vendor virtually sets apart so much of the purchase money as is necessary to pay the mortgage debt, leaving it in the hands of the grantee to be applied to this purpose when the mortgage comes due. But the transaction is, to all intents and purposes, the same in legal effect as if the amount of the mortgage debt had been paid in cash by the grantee to the grantor as part of the purchase money agreed upon as the price of the property at the time of the sale, and applied to the payment of the mortgage. When, therefore, instead of taking from the grantee at the time of the sale the whole purchase money agreed upon as the price of the property, the grantor leaves a part of it in the hands of the grantee to be thereafter applied to the payment of a sum of money for the payment of which the grantor is responsible, there is clearly an implied contract on the part of the grantee that he will apply said portion of the purchase money so left in his hands to the purpose for which he received it and to which he agreed to apply it; and having thus contracted with his grantor, it would operate as a fraud upon the latter if the grantee did not perform his said

contract and apply the money left in his hands as part of the purchase money he agreed to pay for the property, and thus compel the grantor to pay this portion of the purchase money over again, or such part of it as a sale of the land would not produce.

Woodward's Appeal, 38 Pa., 326-327.
Moore's Appeal, 88 Pa., 452-453.
Blood vs. Crew Levick Co., 171 Pa., 328.

It will thus be seen that the implied contract between the vendor of the equity of redemption and his grantee, evidenced by the words, "subject to the payment of the described mortgage debt," grows altogether out of the fact that the amount of the money represented by the mortgage debt is held to have been a part of the purchase money agreed to be paid by the vendee for the property, and which amount was left in the hands of the vendee to be applied to this purpose. It will also be evident from the basis of the contract that the contract on the part of the grantee is simply to pay the mortgage debt in money on the theory that he has in his hands so much money applicable to the mortgage debt.

But the same authorities show (as do the decisions in other jurisdictions which construe the effect of a conveyance of the equity of redemption subject to the payment by the grantee of the mortgage debt) that the implied contract thus made is one made altogether between the grantor of the equity of redemption and his grantee. To this contract the moragagee is no party.

Keller vs. Ashford, 133 U. S., 622 to 625, and cases cited.

The derivative rights of the mortgagee in respect of the contract thus made between the mortgagor vendor and the grantee of the equity, will be treated of presently.

But the rights of the mortgagor vendor, (and of course the derivative rights of the mortgagee), must be measured by the legal extent of the implied contract made by the grantee in accepting a deed of the property subject to the payment of the mortgage debt; and as this contract is founded upon the imputed receipt from the vendor by the vendee of the amount of the mortgage money, the legal extent of the contract is the obligation to pay this amount of money as money to the mortgagor vendor.

In very many cases in the books of assignments of the equity of redemption by the mortgagor, the parties instead of relying upon the implication of a contract on the part of the grantee to pay the mortgage debt derived from a conveyance of the property subject to the payment of the mortgage debt, inserted an express contract for such payment; thus, "subject, however, to the mortgage aforesaid, which said mortgage with the interest due and to become due thereon, the grantee assumes and covenants to pay the amount thereof, forming part of the consideration herein expressed and having been deducted therefrom."

Now, so far as the effect upon the personal responsibility of the vendee is concerned in respect of the mortgage debt, it is just the same, whether arising out of the implied contract derived from the use of the words, "subject to the payment of the mortgage" or arising out of an express contract of the form above given."

Now, in the case of the express contract, it is clearly apparent that all that the vendee has contracted to do is to assume and pay the amount of the mortgage indebtedness; for that is the only and exclusive import of his covenant. And as the implication of contract, from the words above mentioned, "subject to the payment of the mortgage," is an implication of the same contract, which in the other case is expressed in explicit words, it follows, that no other obligation in respect to the mortgage is imposed upon the vendee by the words, "subject to the payment of the mortgage," than is imposed upon the grantee of an equity of redemption, who, in reference to the mortgage debt in express words assumes and covenants to pay the said mortgage debt.

Counsel has heretofore stated that it is generally held that a conveyance of the equity of redemption of the mortgaged property to a grantee with the words, "subject to the described mortgage," and no more, does not impose upon the grantee any personal liability in respect of the mortgage debt. The only effect of such language, according to the decisions generally, is to indicate the extent of the estate which is granted, and thus to show that it is only an equity of redemption that is granted, and that the only right which the mortgagee has for the collection of his debt is the right to make it out of the property mortgaged, or out of the

personal responsibility of the mortgagor upon his covenant in the mortgage.

Elliott vs. Sackett, 108 U. S., 140.
Metropolitan National Bank vs. The St. L. & D. Co., 149 U. S., 447.
1st Jones on Mortgages, Sec. 748.

Wherever this doctrine prevails, it is, of course, perfectly evident that the vendee of the equity of redemption comes under no obligation to the mortgagee, nor to the mortgagor, growing out of the execution of the mortgage or for any of its covenants; and that the only covenants which could affect his ownership of the land would be those which *run with* the land and which would bind him as grantee of the equity of redemption, because, and only because, *they run with the land and were made by his predecessor in title.*

Now, as the only ground upon which it can be held that a grant of the equity of redemption with the clause "subject to the mortgage," described in the grant imposes a personal responsibility upon the grantee is that such a clause is equivalent in import to the clause, *"subject to the payment of the mortgage;"* and, as we have seen that the latter clause is limited, in its legal effect, to an implied contract to pay the amount of the mortgage debt, it is manifest that the clause, *"subject to the mortgage,"* can have, even in Pennsylvania, and under the decisions we are now considering, no greater effect.

And as the only way in which a grantee of the equity of redemption becomes liable to the mortgagor vendor, even to pay the mortgage debt, is by virtue of some provision in the deed of grant which expressly or impliedly is an assumption on his part of the obligation to pay it, it is very certain that, *without a contract, express or implied*, he does not become responsible for any of the other covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee, excepting those running with the land and which latter the law itself imposes For certainly it could never be held that the vendee of the equity of redemption intended, without a contract express or implied to that effect, to become responsible to the mortgagor in respect of his covenants with the mortgagee in matters of subordinate and minor importance to the payment of the mortgage debt, when it is held that he only becomes responsible to the mortgagor for the payment of the mortgage debt when he has made a contract, express or implied, to become responsible therefor.

It follows from the foregoing that unless the covenant, or contract rather, contained in the mortgage on the part of the mortgagor company upon the demand of the trustee to insure the property for the benefit of the mortgagee, if a covenant running with the land, and for this reason binding upon the Penn Company, it never came under any obligation to the mortgagor company to insure the said property for the benefit of the mortgagee, even upon the assumption which we are now making that, under the law in Pennsylvania at the time the deed to the Penn Company was made, the vendee of an equity of redemption in mortgaged property who takes under a deed which declares that the grant is made subject to the described mortgage, thereby assumed as his own the

mortgage debt, and became liable to an action therefore by the mortgagor, or by the mortgagee, and before payment of the mortgage debt by the mortgagor.

## PROPOSITION NUMBER FIVE.

**But independently of all the foregoing, we submit that the provision in the deed of mortgage on the subject of the insurance is not a covenant upon the part of the mortgagor to insure for the benefit of the mortgagee.**

There is no covenant in the mortgage which obliges the mortgagor to insure for the benefit of bondholders, and therefore of necessity no provision obliging the Penn Company, its grantee, to do so, because:

1. Even if the provision in the mortgage relating to insurance does amount to a covenant to insure, it does not provide that such insurance shall be for the benefit of the trustee or bondholders. If such a covenant under the authorities does not imply a covenant to insure for the benefit of bondholders, the trustee can have no claim to insurance taken out by the Penn Company for its own benefit.

The only provision relating to insurance contained in the mortgage is the following clause which is found in Article X of the mortgage, (record p.....):

"It shall be no part of the duty of the party of the "second part (the trustee) to file or record this Inden- "ture as a mortgage or a conveyance of real estate or "as a chattel mortgage or to renew such mortgage or "to procure any further or additional instrument of "further assurance, or to do any other act which may "be suitable or proper to be done for the continuance "of the lien hereof, or for giving notice of the existence " of such lien or for extending or supplementing the "same; *nor shall it be any part of its duty to effect in- "surance against fire or other damage on any portion "of the mortgaged property or to renew any policies "of insurance or to keep itself informed or advised as "to the payment of any taxes or assessments or to re- "quire such payment to be made; but the trustee may, in its discretion,do any or all of the matters and things "in this paragraph set forth, or require the same to be "done."*

It is obvious that there is no requirement in this clause that any insurance taken out in response to a demand by the trustee, shall be for the benefit of the trustee or its cestui que trust, or that it shall be applied to the restoration of the morgaged premises in case of loss or in discharge of the mortgage debt.

This being so, the foregoing clause cannot, as a matter of law, be interpreted so as to construe that covenant to mean that any insurance taken out should be for the benefit of the trustee.

This was expressly decided in the case of Lee vs. Whitely, Law Reports, 2nd Equity, p. 143.

This was a suit seeking a declaration by the Court that the plaintiff was entitled to money payable on a policy of insurance effected by the defendant on certain machinery or to so much thereof as would be sufficient to satisfy the amount due him on the security of the bill of sale.

The defendants had assigned certain machinery by bill of sale to secure a sum of money advanced by the plaintiff. The deed contained a covenant to insure, but no provision for the application of the insurance moneys in case of fire in liquidation of the mortgage debt, or that the insurance so to be effected was to be for the benefit of the mortgagee. The defendant did effect insurance in his own name; the property was destroyed by fire, and thereupon the plaintiff sought to recover the insurance money by virtue of the covenant to insure.

The Court held, per Kindersley, V. C., that the plaintiff had no right to the insurance moneys on the ground that there was no covenant that the insurance to be effected should be for the benefit of the mortgagee, and the opinion of the Court on that subject is as follows:

"Upon the covenant to insure, the question arises "whether the machinery, having been destroyed by "fire, the plaintiff is entitled to have the money secured "by the policy applied in payment of the debt due to "him.

"At first sight it would seem consistent with natural "justice that the plaintiff should have that right; and "the question naturally occurs, why the covenant to in-

"sure should have been required by the plaintiff if it "was not intended that he should have the benefit of "the insurance; and the case before Lord St. Leonards "of Garden vs. Ingram has been cited, in which a ques- "tion of somewhat the same kind was decided in favor "of the mortgagee; but that case differs very mater- "ially in the principle on which it was decided from "the present. In that case the lease contained a cove- "nant that the premises should be insured in the names "of the lessor and lessee, and that the moneys secured "by the policy should be applied in restoring the prem- "ises. The lessee mortgaged his lease, but the mort- "gage contained no mention of the insurance, though "the lease was referred to in the recitals. The prem- "ises having been destroyed by fire, the mortgagee re- "stored them without waiting to get the money due "on the policy; and on a claim filed by the mortgagee, "the mortgagor was decreed to deliver up the policy "and join with the lessor in signing the receipt to the "insurance office, to enable the mortgagee to receive "the money payable under the policy.

"But the present is not the case of the mortgage "of premises on which there was a policy existing at "the time of the mortgage, nor is there here a covenant "that the policy money shall be applied in restoring "the premises; but it is merely an assignment by bill "of sale of machinery, containing a covenant to insure "and it would be impossible to hold, as was done in "the case of Garden vs .Ingram, that the benefit of "the policy passed by the assignment, as the policy at "at the time did not exist. It appears to me that that "case does not govern the present, and that if the plain- "tiff's contention can be sustained, it must stand on

"the footing that by reason of the covenant to in-
"sure there is an implied contract with the mortgagee
"that the policy moneys should be applied in liquida-
"tion of the mortgage debt.

"The question then comes to this: Can I imply
"such a covenant from the language of the bill of
"sale" and on examination of the terms of the instru-
"ment, I am of the opinion that I cannot. Were I to
"do so I should be making a new contract between the
"parties. It was perfectly competent to the plaintiff
"to have stipulated that the policy moneys should be
"applied in liquidation of the mortgage debt or in the
"restoration of the premises, but he has not done so;
"and how can I say that the parties intended some-
"thing which is not stipulate in this instrument or
"make for the plaintiff a better agreement than he
"thought it necessary to make for himself. It might
"be that if he had insisted on such a contract, Messrs.
"Whitely would have refused it.

"In point of fact, the existence of the insurance is
"obviously to some extent for the benefit of the mort-
"gagee, although there was no obligation on the mort-
"gagor to apply the insurance moneys in any particu-
"lar way; because it is for the interest of the mortgagee
"that his mortgagors should be in a solvent condition,
"and that, in case their property should be destroyed
"by fire, they should still have the means of paying the
"mortgage debt."

This case is referred to and its doctrine upheld as good law in 1st Jones on Mortgages, Sec. 401; and also in 1st

Pingree on Mortgages, Sec. 553, which comes down to 1893 and quotes the above as good law and sustains the above doctrine.

It will therefore be seen that if this be the law there was nothing in the mortgage which obliged even the mortgagor to insure for the benefit of the trustee of its centuis que trustent.

It results from the foregoing that the Penn Company has never come into such contractual relations with the mortgagor company or the mortgagee as entitles the latter to any part of the insurance money receivd from the insurance policies in exisence at the time of the re.

## ESTOPPEL.

**1. There is nothing in the conduct of the Penn Company which upon principles of estoppel entitle the mortgagee to claim any part of the insurance money.**

The court below has further assumed in its findings as hereinbefore pointed out that it would be inequitable to award this fund to the Penn Plate Glass Company because **"it had only paid $83,000 for the property and had insured it for over 300,000, and on the de-**

**struction of the property, which was the substantial security for $250,000, it seeks to avoid the payment of the $250,000 (representing the deferred purchase money) and to realize on the $83,000 paid by it upwards of $300,000 in insurance upon property for which it never paid."**

There is absolutely no basis of fact or law for this finding.

As a matter of fact the Penn Company insured only *its own equity of redemption* as it had a right to do and not the interest of the bondholders. Both the Penn Plate Glass Company and the trustee had a right to insure their respective interests up to the full value of the property as will be more fully demonstrated later.

Stinson vs. Insurance Co., 103 U. S., p. 25.
1st Jones on Mortgages, Sec. 397.
Louden vs. Waddle, 242 Pa.

Furthermore, the insurance placed by the Penn Company was only the fair value of its own interest, because in addition to the $83,000 which it paid for the property, it virtually rebuilt the plant at a cost of $200,000 for betterments and improvements, and the attention of the court is called to the following undisputed and uncontradicted testimony of W. L. Kann, (Record, pp. 475 and 476).

"Q. At the time of this sale you were a judgment creditor, were you not, of the company?

"A. Yes, sir, I was.

"Q. Mr. Kann, I wish you would state what additions or improvements or betterments you or the Penn Plate Glass Company have put upon this property since the sale to you?

'A. During the time I had owned the property myself, and afterwards when it came into the possession of the Penn Plate Glass Company, up to three or four months ago, we have spent about one hundred and eighty-five to two hundred thousand dollars on the property.

"Q. In what way?

"A. For betterments, additions, constructing of a water plant, the erection of a gas plant and adding thereto of additional machinery in order to complete the plant, had to buy additional ground in order to put these constructions on. When I obtained possession of the property, I found that it was in an incomplete state and not capable of producing anything like the amount of product which they have claimed it would. In fact it couldn't be operated at all in the way that it was then constructed. Not enough finishing machinery, wasn't enough boiler capacity nor engine capacity, the natural gas had given out and no provisions had been made to use fuel in the plant. When we attempted to burn crude oil, the insurance companies wouldn't insure the property if we continued it, and I was put to the necessitv of putting in a fuel plant.

"Q. What did it cost you?

"A. Well the gas plant cost, I suppose, in the neighborhood of $25,000, probably more than that, but at least $25,000. I have got the items.

"Q. I wish you would specify if you can and describe definitely the permanent structures or betterments

that you put upon the land which were not there at the time of the receiver's sale.

"A. I started to construct, and have since completed, a water plant. The plant required a great deal of water in its operation, and the only source of supply was the local company there which wouldn't guarantee them a supply at all, and what they did at a very high price, and several times in the history of the company before I got hold of it they had to shut down entirely for want of water. One of the first things I did was to construct a water plant. That plant cost in the neighborhood of $40,000; and as I stated before, in regard to the fuel, fuel was a very large item there. In fact, the plant couldn't operate without having a fuel of some kind.

"Q. What was the nature of it?

"A. Manufactured gas, called a producer gas plant. It manufactured gas out of coal.

"Q. Can you give approximately the value of that?

"A. The plant itself cost somewhere in the neighborhood of $25,000. It and its attachments into the building would cost all of $50,000. We had put on additional boilers. There wasn't sufficient boiler capacity there to run the plant. We put on an addition to the casting hall. That is the part of the plant in which you cast the glass, both in buildings and in the kilns. I had to reconstruct all the furnaces as they had been built for natural gas, and natural gas had all given out and we had to put in fuel furnaces. We put in one-third increase in the polishing machines and about one-third increase in the grinding machines. Had to put new roofs over most all the buildings, railroad switches, in order to handle our material, etc.

"Q. Then in general what is the cost and value of the improvements and permanent betterments which you placed upon that property after the sale to you?

"A. About $200,000."

*Fourth.* **The position of the Court below in concluding that because it could have ordered the Penn Company to insure for the benefit of the trustee at the time of the application for a Receiver, it could two years thereafter and after the destruction of the property by fire, impress a lien on insurance that had been taken out by the Penn Company, for its own benefit prior to that application, is evidently wrong.** . . . . . .

Assuming that the Court could have made the order at that time, which is denied, the Penn Company could have insured its own interest and also the interest of the mortgagee too. The Court did not make that order, and therefore the Penn Company did not insure the interest of the mortgagee, as it could have done, in addition to its own, and is now called upon to give up its own insurance to the trustee. The positions of the parties have changed and the result is inequitable.

Counsel, therefore, contend that they have demonstrated that the findings of fact made by the Court in regard to estoppel are unsupported by any evidence, and therefore claim in conclusion on this branch of the case:

*Fifth.* **That the trustee under the mortgage has no claim on this fund growing out of any estoppel founded on the contract of the Penn Plate Glass Company.**

In this connection counsel call the attention of the Court by way of resume to the following propositions and conditions:

1. The Penn Company is a corporation, legally formed, and acquired the mortgaged property in due form, and has never in any way come under any obligations in writing other than the obligations created by the acceptance of the deed of the equity of redemption in the property, nor had it in any way done anything to give the trustee any claim upon the insurance money if the acceptance of the deed did not give that right.

2. The principles of equitable estoppel are, of course, perfectly familiar.

In order to create such an estoppel as will prevent a party from asserting his legal rights to property, there must be some intended deception in the contract or declarations of the party or such gross negligence on his part as to amount to constructive fraud.

Brant vs. Virginia C. & I. Co., 93, U. S., 326.

Henshaw vs. Bissell, 18 Wallace 255.

When the condition of the title is known to both parties or both have the same means of ascertaining the truth there is no equitable estoppel.

93 U. S., 326.

Where one by his words or conduct causes another to believe the existence of a certain state of things and in-

duces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter the different state of things as existing at the same time.

Lord Denman in Pickards vs. Sears, 6 Ad. & E. 11, 469.

So far from any conduct of the Penn Company coming within any of these descriptions of the conduct out of which arises an equitable estoppel in reference to the insurance of the insured property, the facts hereinabove set forth show conclusively that the trustee for three years and more was fully aware that the Penn Company, as well as its grantor, W. L. Kann, denied that there was any obligation on the part of the grantees of the equity of redemption in the mortgaged property to insure for the benefit of the mortgagee, and that no such insurance was or would be effected. The trustee, therefore, allowed the buildings and plant to remain uninsured on behalf of the mortgage and the bonds secured thereby during all this time—that is to say, for about three years before the fire, with full knowledge of the fact that the property was not insured for the benefit of the bondholders, that it would not be, and that the insurance existing thereon was entirely for the benefit of the Penn Plate Glass Company.

It was entirely within the power of the trustee to insure the property for the benefit of its cestuis que trustent and to the full value of the mortgage, notwithstanding the fact that the property was already insured to the amount to which it was insured for the benefit of the

Penn Company, and it was the duty of the trustee under the mortgage to have notified the bondholders that the mortgagor company had not insured for their benefit at the time mentioned, and that the assignees of the equity of redemption, denying their obligation to insure, had refused to insure for the benefit of the mortgagee. If the mortgagee bondholders refused to advance the trustee money enough to affect the insurance, the trustee could have advanced it and it would have been payable out of the proceeds of the sale of the mortgaged property, and with insurance there could have been no possibility of any loss to the trustee. It could also have insured and charged the premium to the Penn Company if it were the duty of that company to insure. But at all events, the failure to insure for the benefit of the mortgage was the fault either of the trustee or the bondholders, after the failure of the mortgagor company to insure, and the refusal of the Penn Plate Glass Company and Kann so to do. Therefore, for any loss which may result to the bondholders because of the non-insurance of their property for their interest and protection, neither Mr. Kann nor the Penn Company are to blame.

It is unjust and inequitable to hold the insurance which the Penn Plate Glass Company had affected for its own benefit, when the trustee, with full knowledge of the facts, could have insured itself. Such is not the proper measure of damage for a breach of the covenant to insure, even if the Penn Company were bound to do so. The utmost liability of the Penn Company, taking into account the full knowledge and notice to the trustee of its refusal to insure, would be the cost of maintaining insurance.

The case would be very different if the Penn Company had secretly taken out insurance for its own benefit and allowed the trustee to rest under the assumption that it had insured for the benefit of the bondholders.

*Sixth.* **It is of course well settled that the Penn Company had by virtue of the ownership of the equity of redemption in the buildings and plant which were the subject of the insurance, an insurable interest equal to the entire insurable value of the insured property, although said company was not personally liable for the mortgage debt.**

Stinson vs. The Ins. Co., 103 U. S., page 25.
First Jones on Mortgages, Sec. 397.

The attention of the Court is called particularly to the case of the insurance company against Stinson. There the plaintiff had a contract to build a hotel for $25,000 and had nearly completed it, when, failing to get his payments from the owner, he filed a mechanic's lien against the building and began action on that lien. Whilst the action was pending, he insured the property with the defendants, the insurance company, for $5,000, the policy stating his interest to be that of contractor and builder. There was a mortgage of $17,000 on the property which was prior to the mechanic's lien, and when the property burnt the insurance company contended by way of defense that the plaintiff had no insurable interest because the property, when insured, was not worth more than the amount of the mortgage of $17,000 which was prior to the plaintiff's lien. Justice Bradley delivered the opinion of the Court, and says, inter alia, on page 28 et seq.:

"As to the other question, relating to the insur-
"able interest of the plaintiff, we think that the
"charge given was equally free from exception.
"There is no doubt that the owner of property had
"an insurable interest to the extent of the value of
"the building, notwithstanding the existence of a
"mortgage on the property of sufficient amount to
"absorb it. Leading authorities on the point may be
"found cited in May on Insurance, sects. 81, 82. The
"remarks of Mr. Chief Justice Marshall, in delivering
"the opinion of the Court in Columbian Insurance
"Co. vs. Lawrence (2 Pet. 25), are apposite and illus-
"trative. The assured in that case, though in posses-
"sion, had only a contract for the purchase of the
"property, subject to a condition which had not been
"complied with, but of which the vendor had taken
"no advantage at the time of effecting the insurance,
"or at the time of the loss. The Chief Justice says:

" 'That an equitable interest may be insured is ad-
"mitted. We can perceive no reason which excludes
"an interest held under an executory contract. While
"the contract subsists, the person claiming under it
"has undoubtedly a substantial interest in the prop-
"erty. If it be destroyed, the loss in contemplation
"of law is his. If the purchase-money be paid, it is
"his in fact. If he owes the purchase-money, the
"property is its equivalent, and is still valuable to
"him. The embarrassment of his affairs may be such
"that his debts may absorb all his property; but this
"circumstance has never been considered as proving
"a want of interest in it. The destruction of the prop-
"erty is a real loss to the person in possession, who
"claims the title under an executory contract, and the
"contingency that his title may be defeated by subse-

"quent events does not prevent this loss.

"The principle asserted in these remarks, as well "as the reason of the thing, leads to the conclusion, "that the owner of an equity of redemption has an "insurable interest equal to the value of the insurable "property embraced therein, whether he is personally "liable for the mortgage debt or not. His interest "arises from his ownership, carrying with it the inci- "dental right of redeeming the property from the en- "cumbrances on it. If he is also personally liable for "such incumbrances, it only makes his interest more "direct and exacting."

The same principle is upheld in the Pennsylvania case of Loudan vs. Waddles, 98, Pa., p. 242.

Along with this right of the Penn Company as owner of the equity of redemption to insure for its own protection alone the buildings and plant to the full insurable value, there existed the right of the trustee and of its *cestuis que* trustent to insure for their own protection the same buildings and plant to the amount of the mortgage, provided the insurable value of the property in the buildings and plant were equal to the mortgage debt, and upon the destruction of the buildings and plant, the owner of the equity of redemption and the mortgage could each recover the full amount of its insurance.

Stinson vs. Ins. Co. above cited, 103 U. S., p. 25.

The Penn Plate Glass Company, then, having this right, insured the property only for the protection of its own interest, and therefore the whole insurance money belongs to it as the owner of the equity of redemption, notwithstanding the existence of the $250,000 mortgage, unless the bare purchase by it subject to the mortgage created a duty on its part to insure for the benefit of the bondholders, Counsel for defendant are left free to discuss this question unaffected by any surrounding facts or circumstances in the way of equitable estoppel, and with no pretense of any contract, express or implied, between the Penn Plate Glass Company and the mortgager or the trust company, except that arising from the bare acceptance of the deed conveying the equity of redemption in the mortgaged property, and to this question they will now proceed to address themselves.

2. It is shown by the allegations of the mortgage trustee as made in its supplemental bill:

(a) That the fire occurred in April, 1898:

(b) That while Kann owned the property (from July, 1894, to July, 1895), the mortgage trustee demanded of him insurance for the benefit of the mortgagee, and that he denied his obligation so to insure, and informed the trustee that he had not insured and that the trustee knew he had not so insured while he held the property:

(c) That upon the purchase by the Penn Company, a similar demand and a similar refusal were made; and

that the trustee knew when he filed the bill for foreclosure in July, 1896, that the Penn Company had not insured for the benefit of the mortgagee.

(d) That upon the filing of the bill in 1896, the Penn Company still denied its obligation to insure; and from that time to the fire the trustee and the bondholders omitted to insure, and *chose to rely* on the bond of Kann and Wertheimer, which, while reiterating their denial of any obligation of the Penn Company to insure for the benefit of the mortgagee, only covenanted, *if said obligation existed,* to appropriate out of insurance affected by the Penn Company, sufficient to pay the bonds

(e) That the insurances severally affected by Kann and the Penn Company upon the latter of which the trustee now claims a lien for the benefit of the bondholders, were effected for the protection alone of the estate and interest of Kann, while owner, and afterwards of the Penn Company, the respective owners of the equity of redemption; ***and it was expressly declared on the face of the policies that said insurance did not cover the interest of the bondholders.***

(f) That these insurances were placed at the time of the respective purchases of the property by Kann and by the Penn Plate Glass Company and were maintained by Kann and afterwards by the Penn Company until the fire; that this latter is the insurance in question; it was not placed *after* the application for a Receiver, but long *prior* to the filing of the original bill, and was in existence at the time of the application for the Receiver and of the alleged agreement of the Penn Company to insure as found by the Court.

(g) That from a time shortly after Kann purchased the property in June or July, 1894, up until the occurrence of the fire, the trustee knew and was notified repeatedly—1st, that both Kann and the Penn Company denied that there was any duty on them to insure for the protecion of the interests of the bondholders; and, 2d, it knew that no insurance of that character existed, and that this knowledge existed during that whole period.

(h) That the Penn Plate Glass Company never agreed at the time of the application for a Receiver or at any other time to insure for the benefit of the Trustee, if it should be held it was bund to do so, nor did it ever place any insurance subsequent to that time or in pursuance of the promise.

But as a matter of fact Kann and Wertheimer did give their individual and personal guarantee that *out of the insurance existing at that time and which had been previously taken out by the Penn Company as above set forth,* there should be set aside sufficient to pay all valid outstanding bonds, *if it should be finally judicially decided that the trustee was entitled to an equitable lien on that existing fund.*

(i) That Kann and the Penn Company on their several acquisitions of the property, put betterments thereon to the extent of two or three hundred thousand dollars—practically rebuilt the plant, and the insurance placed by them fairly represented the value of their equity of redemption which was alone insured, exclu-

sive of the mortgage debt, and therefore there is no ground for the assertion of the Court that if the fund should be awarded to the Penn Company, it would be so much purely speculative gain.

Therefore counsel for defendants, leaving for the present the questions of law raised by the Court as to the effect of the purchase by the Penn Company subject to the mortgage, will address themselves to the various findings of fact upon which the Court has based its idea of an equitable estoppel; and of course, if they can convince the Court that the same are erroneous, the reasoning and conclusion of the Court below based thereon must fall to the ground.

The findings of fact which counsel claim to be erroneous and the reasons therefor are as follows:

*First.* The Court finds as a fact that Pennsylvania Plate Glass Company, the mortgagor, had originally insured for the benefit of the Trustee, and that upon its insolvency this insurance had been kept up by Joseph W. Stoner, the Receiver, under the order of the Court of Westmoreland county during his receivership, and that:

"These policies were in force when Kann pur-
"chased and the proofs show that they were turned
"over to him and he was informed by the Receiver

"that they were in existence and were by him al-
"lowed to lapse."

Opinion of Court Below, Record p.....

This is directly in contradiction to the testimony of Jos. W. Stoner, the Receiver, the only witness on the subject who denied that the policies were turned over to Kann.

Stoner testifies as follows, as a witness on behalf of complainant:

"Q. And did you keep it up (the insurance) as
"Receiver?
"A. Yes, sir.
"Q. And then, of course, when you sold the
"property you thought you were done with it.
"A. *I stopped paying any more money and allowed "the policies to lapse.*
"Q. * * * When you sold this property you
"turned the policies over to Mr. Kann? Is that true
"or not?
"A. No, sir.
"Q. You didn't do anything of the kind?
"A. *I did not.*
"Q. And you simply allowed whatever policies
"the company had taken out, or you had taken out,
"to lapse?
"A. Yes, sir; that is my recollection now.
"Q. But whatever you had, whether they had
"lapsed or not, you delivered over as a *matter of*

*"fact to Mr. Kann when he became the purchaser at "Receiver's sale?*

"A. No, sir.

Record p. 77.

"Q. What did you do with them?

"A. I had them stored in the proper safes in the "factory. It became necessary to remove and take "the books out of the factory when operations were "instituted by the new corporation, and I boxed them "carefully and shipped them in here and stored them.

Ib. p. 78.

This is the testimony of plaintiff's own witness and comprises all there is on the subject; but at all events it must be perfectly evident that the insurable interest of the mortgagor and the receiver ceased on the sale to Kann and therefore the policies must have lapsed of themselves and could not have been in force in Kann's hands.

In addition, the counsel for defendant merely point out that Kann *could not have allowed these policies to lapse unknown to the trustee.* This will be demonstrated hereafter when counsel come to consider the evidence showing that the trustee had full knowledge of the fact that both Kann and the Penn Company continuously refused to insure for the benefit of bondholders

*Second.* The Court below has further made findings of fact from which it implies all the way through, not only that Kann secretly allowed the foregoing insurance to lapse, but that the insurance fund upon which the Court has impressed an equitable lien in favor of complainant *was not taken out until the complainants made a motion for a Receiver for* the mortgaged premises at the time of the original bill, and that such insurance was taken out subsequently thereto under a promise alleged to have been made by the Penn Plate Glass Company to do so if it should be judicially determined that it was bound to insure for the benefit of the trustee; and that in the insurance so taken out the Penn Plate Glass Company had surreptitiously and without the knowledge of the court or trustee placed a provision in the policies totally excluding any interest of the bondholders therein.

This is a total misconception on the part of the Court and is unjustified by the allegations of the pleadings, the admitted facts or any testimony in the case.

The findings of the Court on this subject are as follows:

(*a*) "That on the filing of the bill, the trustee "moved for a Reeeiver to take possession. The "plant was being operated by the Penn Plate Glass "Company, a large number of persons employed, the "issues of the case and the legal rights of the parties "not determined. In this aspect of the case, and the "Court being satisfied that a Receiver could not ope-"rate the works, it declined to appoint a Receiver."

See Opinion p.....

(*b*) "That the question of insurance arose during "the pendency of the application for a Receiver, and "thereupon counsel for W. L. Kann and the Penn "Plate Glass Company signified their willingness to "place insurance upon the property for the benefit of "the trustee *if they were bound to do so, but denied "their liability to do so.*

"That subsequently they did place a large amount "of insurance upon the property, (Opinion Record "p. .....) and this insurance was placed by a party "to this litigation under the stress of an application "for the appointment of a Receiver and a consequent "exclusion from possession. (Ib. p. .....)

In pursuance of that agreement and in response "to a demand upon these parties to insure made by "counsel for the trustee at the time of the applica- "tion for a receiver."

(c) "That this agreement to insure was in the "form of a guaranty, 'signed by W. L. Kann (the "president of the company) and Emanuel Wert- "heimer (a stockholder) and filed in Court during "the pendency of the motion aforesaid,' con- "ditioned in the event of a loss by fire of the "property described in the said Pennsylvania "Plate Glass Company mortgage, that then there "should be paid to the Farmers' Loan & Trust "Company in trust for the holders of the valid "bonds secured by the mortgage, a sum equal to

"the total amount of such valid bonds out of the "policies of insurance existing in favor of the "Penn Plate Glass Company, *provided that it shall "have been finally adjudicated that the Penn Plate "Glass Company, the present owner of said property, "is bound or liable by anything contained in said "mortgage or the terms of its purchase of the de- "scribed mortgaged premises to keep or maintain in- "surance for the benefit of holders of the bonds se- "cured by the said mortgage;* and it is further pro- "vided that in the event of a loss by fire and the in- "surance money in that event is applied to the "restoration of the plant of the Penn Plate Glass "Company, bound by said mortgage, that then this "obligation should be null and void without preju- "dice to the right of the Penn Plate Glass Company, "its successors and assigns, to deny its liability to "take out, keep and maintain policies of insurance "on the said plant at any time for the benefit of the "holders of valid bonds secured by the mortgage;

"And it is further distinctly understood and "agreed that in the event of partial losses and par- "tial restoration, the amount of the insurance money "applied thereto shall be a credit to the account "for which we have become bound."

(d) "That after the loss, it appeared in the in- "surance placed that the Penn Plate Glass Com- "pany and W. L. Kann, its president, had placed "a provision therein in terms excluding the bond- "holders from any interest in the policies; that

"this was an act inter alios acta, the trustee and "Court had no knowledge of it, and it can in no "way effect the legal or equitable status and rights "of the parties before the Court."

It will be apparent at once from the foregoing findings of fact that the Court below proceeds on the assumption that the Penn Plate Glass Company at the time of the application for a Receiver, had agreed to place insurance for the benefit of the trustee, subject only to the bare question as to whether or not it was bound under the terms of its purchase, subject to the mortgage and the terms of the mortgage, to so insure, and notwithstanding this agreement, had surreptitiously placed a provision in the policies excluding the trustee from any participation therein.

It will be seen that this assumption is vastly important to defendants, inasmuch as it deprives the Penn Company of the legal advantage arising from the fact that the insurance was insurance *previously* placed for its own benefit with full notice to the trustee that it was for its own benefit and not for the benefit of the trustee at all.

Not only is there absolutely no evidence to justify this assumption of the Court, but every fact and all the pleadings in the case show the contrary. The true state of facts is as follows:

(a) That immediately upon Kann's purchase of the

property at Receiver's sale and upon his taking possession of it in July, 1894, the trustee notified Kann as owner of the property to insure for the benefit of bondholders, and that he distinctly denied any duty on his part to do so and so notified the trustee. This is conclusively shown by the allegations of complainant's own bill in Paragraph 19 on page 16 of the record where the averments are as follows:

> "And your orator further alleges that, after "said Kann had purchased said mortgaged prop- "erty for the said sum of $37.500 or thereabouts "and had become the owner thereof subject to "the mortgage * * * * he recognized the "validity of the mortgage and bonds secured "thereby and paid interest thereon, *and although "your orator persistently demanded of said Kahn "that he carry out the terms and provisions of said "mortgage concerning insurance and demanded that "he preserve the insurance already affected as afore- "said, and that he affect further insurance for the "benefit of your orator as such trustee of said bond- "holders, nevertheless said Kann positively and de- "liberately refused to preserve the existing insurance "or to affect new insurance for the benefit of your "orator as such trustee or of said bondholders, and "intentionally allowed the said existing insurance "(namely the insurance affected by the Pennsylvania "Plate Glass Company and its Receiver) to lapse and "be cancelled."*

Complainants further allege in the same paragraph that they knew that this refusal to insure by Kann still existed at the time he sold the property to the Penn Plate Glass Company. That averment is as follows:

> "Said breach was in existence at the time when "said Kann organized the defendant Penn Plate "Glass Company for the purpose of operating said "place and sold said property to said new company "as aforesaid, and said breach was known to said "Penn Plate Glass Company at the time of its said "purchase and has been known to said company ever "since and still continues."

***It is, therefore, incontestable that the trustee knew that Kann refused to insure, and that there was no insurance on this property for the benefit of the bondholders from the time Kann purchased, in July, 1894, up to the time of the purchase by the Penn Plate Glass Company, in July, 1895.***

It is equally incontestable that from the acquisition of the property by the Penn Company in July, 1895, up to the time of the fire in April, 1898, the trustee knew:

(a) That the Penn Plate Glass Company had not insured for the benefit of the trustee or bondholders.

(b) That during that period and prior to the filing of the original bill in 1896, and the application for the

Receiver, the Penn Company had taken out insurance for its own benefit, and that this insurance was then in existence and was the fund upon which the trustee claimed a lien in its supplemental bill.

This appears from the following:

On November 29th, 1895, several months after the Penn Company had become the owner of the mortgaged property, the trustee notified the Penn Plate Glass Company, the Pennsylvania Plate Glass Company and Kann, to insure for the benefit of the trustee.

This is a fact found by the Court.

Opinion Record, p. .....

The trustee, therefore, must have known that up to this time, November 29th, 1895, over a year before the original bill was filed, that the Penn Company had not insured for the benefit of the bondholders of the trustee.

The complainant further avers in its supplemental bill:

(a) That on or about July 8th, 1896, being the time the original bill was filed, it moved for the appointment of a Receiver, and that this motion was refused by the Court.

(b) That as a ground for the appointment of a Receiver, the trustee urged the previous refusal of the Penn Company and Kann to insure for the protection of the bondholders, and a lack of any protection at that time by way of insurance in case of fire

(c) That the Penn Company at that time had previously taken out policies covering its property to the amount of $450,000.

(d) That,

"In answer to its said insistence concerning "the insurance of its interest as trustee, Kann and "the Penn Plate Glass Company continued to "maintain an attitude of refusal to effect such in- "surance in spite of complainant's demands, but "that Kann and one Wertheimer filed in Court a "bond whereby they individually guaranteed that "out of the above mentioned policies so prev- "iously taken out by the Penn Company and "then existing, there should be paid to complain- "ant, trustee for bondholders, a sum equal to the "total amount of valid bonds, *provided that it should "be finally adjudicated that the Penn Plate Glass "Company was bound or liable by anything contained "in said mortgage or the terms of its purchase, to "keep or maintain insurance for the benefit of the "holders of bonds secured by the mortgage.*"

These recitals will be found in paragraph XVI. and XVII. of the supplemental bill, supplemental record pages 17 and 18 and are literally as follows:

"XVI. Your orator further alleges that this case "was begun on or about the 8th day of July, 1896; "that immediately after your orator made a mo- "tion before this Honorable Court for the appoint- "ment of a Receiver herein to take possession of "the said mortgaged property pending the decision "of this cause; that one of the chief grounds of "your orator's said motion was to obtain a means "for affecting and providing insurance of its inter- "ests as such trustee and of the interest of said "bondholders, in view of the refusal to effect such "insurance hereinbefore set forth; that the said de- "fendants, Kann and the Penn Plate Glass Com- "pany, were both before this Honorable Court on "said motion, and opposed said motion and suc- "ceeded in obtaining a ruling of this Court adverse "to your orator and the denial of your orator's said "motion. And your orator further alleges that in "answer to its said insistence concerning the insur- "ance of its interests, as a trustee, and of those of "the said bondholders, said defendants Kann and "the Penn Plate Glass Company continued to main- "tain their attitude of refusal to effect such insur- "ance in spite of the demands of your orator, and "procured to be filed in this Court a certain bond "whereby said Kann and one Emanuel Wertheimer "covenanted to pay to your orator, as such trustee "for the holders of said bonds in case of loss, a sum "equal to the total amount of such of said bonds as "might be valid, out of certain policies of insurance "then existing in favor of the said Penn Plate Glass "Company, being the policies hereinafter referred "to, provided that it should be finally adjudicated "that the said Penn Plate Glass Company was "bound or liable by anything contained in said mort-

"gage, or the terms of its purchase of said mort-
"gaged property, to keep and maintain insurance
"for the benefit of the holders of bonds secured by
"said mortgage."

"XVII. Your orator further alleges on informa-
"tion and belief, that the Penn Plate Glass Com-
"pany has taken out policies of insurance covering
"respectively said mortgaged property, or a part
"thereof, with all of the Insurance Companies made
"by this bill parties to this cause, being all of the
"defendants hereto other than the said defendants
"Pennsylvania Plate Glass Company, Kann and
"Penn Plate Glass Company, and that said policies
"amount in the aggregate to $450,000 or thereabouts,
"and constitute legal and valid obligations on the
"part of said defendant insurance companies; but
"your orator is not informed as to, and cannot there-
"fore allege, the amounts of the respective policies."

It will, therefore, be seen that the policies mentioned in the XVI. paragraph, being the "policies hereinafter referred to and then in existence" are the same policies mentioned in paragraph XVII.

But in addition to the foregoing, the defendants, Kann and the Penn Plate Glass Company, in their answer to the supplemental bill, distinctly aver and admit:

"That long before the original bill was filed in
"this case, they gave distinct, repeated and writ-
"ten notices to the said plaintiff that they were

"not bound to insure said premises for the bene-
"fit of the plaintiff and that they would not nor
"would either of them insure said premises for the
"benefit of the plaintiff as trustee or of the bond-
"holders secured by said mortgage to the end that
"said plaintiff as trustee and the said bondholders
"should protect themselves under said notice by in-
"surance of their respective interests."

Defendant's Answer, Paragraph 14, Record p. 12.

The foregoing allegations of the bill and the admissions of the answers were offered in evidence by complainant.

See Supplemental Record, pp. 51, 52 and 53.

The foregoing averment of the answer stands as evidence, being responsive to the bill.

In addition the attention of the Court is called to the following testimony of Mr. J. S. Ferguson, of counsel for the complainants:

"Q. Mr. Ferguson, your firm is associated with
"the firm of Turner, McClure & Ralston as attor-
"neys for the plaintiff in this case?

"A. Yes, sir.

"Q. You have had professional charge of this
"case?

"Q. I have.

"Q. Under the original bill, did you, on behalf

"of complainant, make a motion to have a Re-
"ceiver appointed?

"A. I did.

"Q. And was that motion denied by the Court?

"A. That motion was denied by the Court on "the ground that the Penn Plate Glass Co. was "solvent, and that it would be an unwarrantable "interference with its business until the final deter-"mination of the case.

"Q. At the time of making the motion, or shortly "thereafter, did you say anything in the presence "of the Court, and Mr. Schoyer, representing the "defendants, and the Penn Plate Glass Co., relat-"ing to insurance on the property?

"A. According to my recollection, I received no-"tice from Judge Buffington that he had concluded "to deny the appointment of a Receiver. According "to my recollection it was the following day I went "into Court. Mr. Schoyer was there and Mr. Kann "was there, and I said to the Court that in consider-"ation of the motion for a Receiver, it occurred to me "that the Court had not considered the fact that this "property was without insurance, and that there was "danger of fire, that my client was a trustee without "funds and that that was a matter that ought to be "considered, and that we were entitled to insur-"ance. The other side denied that they were bound "to insure under the terms of the mortgage. I in-"sisted we should have insurance, they denying that "we were entitled to insurance under the mortgage, "and under the circumstances, Judge Buffington "said: 'I can't decide that question,' and intimated "to them that if they were bound to insure they "ought to protect us, and they denied they were "bound to insure, and the paper signed by Mr. Kann

"and Mr. Wertheimer was given to us in pursuance "of my demand for insurance, and filed in Court and "it is on file to-day.

"Q. So that this bond was filed because you "were insisting on insurance on behalf of the com- "plainant?

"A. Yes, sir.

"Q. And when you say the other side denied "their liability to insure, you mean the Penn Plate "Glass Co. and W. L. Kann?

"A. Yes, sir; those are the parties I mean; and "they did file it.

"Q. They gave what?

"A. A bond signed by Wertheimer and Kann.

"Q. That is the bond that has already been given "in evidence in this case?

"A. Yes, sir.

Supplemental Record pp. 92 and 93.

**Conclusions from Foregoing Evidence.**

We, therefore, have it established by complainant's own averments and the undisputed admissions of the answers and the testimony of complainant's own counsel.

(a) That long prior to the filing of the original bill in July, 1896, both Kann and the Penn Plate Glass Company gave complainant repeated, distinct and written notices that they had not and would not in the future insure for the benefit of the bondholders.

(b) These notices were in answer to repeated demands made by complainant extending through the ownership of Kann and the Penn Company.

(c) That in 1896, two years after Kann purchased and one year after the sale to the Penn Plate Glass Company, complainant asked for a receiver because the Penn Company had refused to insure for the benefit of bondholders, and there was danger of fire and no existing insurance for the benefit of bondholders.

(d) That the Penn Company in open Court at this time and in the face of this application, refused to insure for the benefit of the trustee then or in the future.

(e) That complainant thereupon acquiesced in this refusal and in open Court accepted the personal bond or guarantee of Kann and Wertheimer that they would be personally responsible if the Penn Company would not set aside, out of policies which they had already taken out for its own benefit, an amount sufficient to make good any loss by fire to the valid bonds secured by the mortgage, provided that the Penn Plate Glass Company was bound to insure for the benefit of the trustee at all; the policies out of which payment was to be made same policies which had been taken out previously by being, according to complainant's own averment, the the Penn Company and on which complainant now seeks an equitable lien.

(f) That the trustee permitted matters to remain in *statu quo* for more than two years from this time until the occurrence of the fire in April, 1898, relying upon

the individual bond which only became effective as a personal liability against Kann and Wertheimer in the event of a judicial determination that the Penn Company was liable to insure.

From this evidence the conclusion is irresistible:

That the trustee from the time of the purchase by Kann in July, 1894, through the time of the ownership of the property by the Penn Plate Glass Company up to the fire, at all times knew that there was no insurance for the benefit of the trustee; and that prior to the filing of the original bill in July, 1896, the Penn Plate Glass Company had taken out insurance which was in existence at that time, and that this insurance was for its own benefit and not for the benefit of the trustee.

**The evidence which has been cited is the only evidence in the case on these points, and therefore counsel for respondents submit that they have demonstrated that the court below is in error in finding:**

(a) That the insurance in question was effected after the application for the receiver or under stress of that application.

(b) That the trustee was ignorant of the fact that the insurance previously taken out by the Penn Company was for its own benefit and not for the benefit of the trustee, or that the excluding clause was afterwards

placed in the policies without the knowledge of the trustee.

(c) That the Penn Plate Glass Company at the time of the application for a receiver or any other time, promised to insure for the benefit of the trustee or did insure in pursuance of such promise.

In this connection, counsel wish to call the attention of the Court to the fact that the Court below in its opinion treats the guaranty of Kann and Wertheimer as an agreement of the Penn Plate Glass Company, and upon this idea bases its findings:

1st. That the Penn Plate Glass Company promised at that time to insure for the benefit of the trustee.

2nd. That it did so insure thereafter and that the fund upon which it has impressed a lien was insurance taken out subsequently thereto and in pursuance of the agreement therein contained.

*This is absolutely and entirely erroneous.*

The Court has not quoted this instrument in full in its opinion. An inspection of that agreement will show:

(a) That it was signed by Kann and Wertheimer as individuals and not by the Penn Plate Glass Company and that it was not an agreement of the Penn Plate Glass Company at all.

(b) That insurance had already been taken out by the Penn Plate Glass Company for its own benefit and this insurance was then in existence.

(c) That Kann and Wertheimer agreed to become personally liable in the event that the Penn Company failed to set aside *out of this existing insurance fund* in case of loss by fire, an amount sufficient to pay all valid outstanding bonds, provided that it should be judicially determined that the Penn Company was bound to insure for the benefit of the trustee.

This bond was accepted by the trustee.

Counsel, therefore, contend that the Court never had this fund in its grasp, and the remedy of the trustee, if any, is a personal action against Kann and Wertheimer for a breach of their agreement. Counsel inserts in this place, for the inspection of the Court, a full copy of said agreement, which is as follows:

"We, the undersigned, Emanuel Wertheimer and "W. L. Kann, of Allegheny City, Pennsylvania, "jointly and severally covenant to and with the "Farmers' Loan & Trust Company, of New York, "Trustee named in a certain mortgage of the Penn-"sylvania Plate Glass Company, dated the first day "of January, 1891, and recorded in the Recorder's "Office of Westmoreland County, Pennsylvania, in "Mortgage Book Vol. ....., page ..... That "in the event of a loss by fire of the property de-

"scribed in the said Pennsylvania Plate Glass Com-
"pany mortgage, that then there shall be paid out
"to the said Farmers' Loan & Trust Company, trus-
"tee, in trust for the holders of valid bonds secured
"by the said mortgage, a sum equal to the total
"amount of such valid bonds, out of policies of in-
"surance existing in favor of the Penn Plate Glass
"Company.

"Provided, that it shall have been finally adjudi-
"cated that the Penn Plate Glass Company, the
"present owner of the said property, is bound or
"liable by anything contained in the said mortgage,
"or the terms of its purchase of the described mort-
"gaged premises, to keep and maintain insurance for
"the benefit of the holders of bonds secured by the
"said mortgage.

"And it is provided further that in the event of a
"loss by fire, and the insurance money payable in
"that event is applied to the restoration of the plant
"of the Penn Plate Glass Company, bound by the
"said mortgage, that then this obligation shall be
"null and void, without prejudice to the right of the
"Penn Plate Glass Company, its successors and as-
"signs, to deny its liability to take out, keep and
"maintain policies of insurance on the said plant, at
"any time for the benefit of the holders of valid
"bonds secured by the said mortgage, or for the
"trustee of said mortgage. And it is further dis-
"tinctly understood and agreed that in the event of
"partial losses and partial restorations the amount

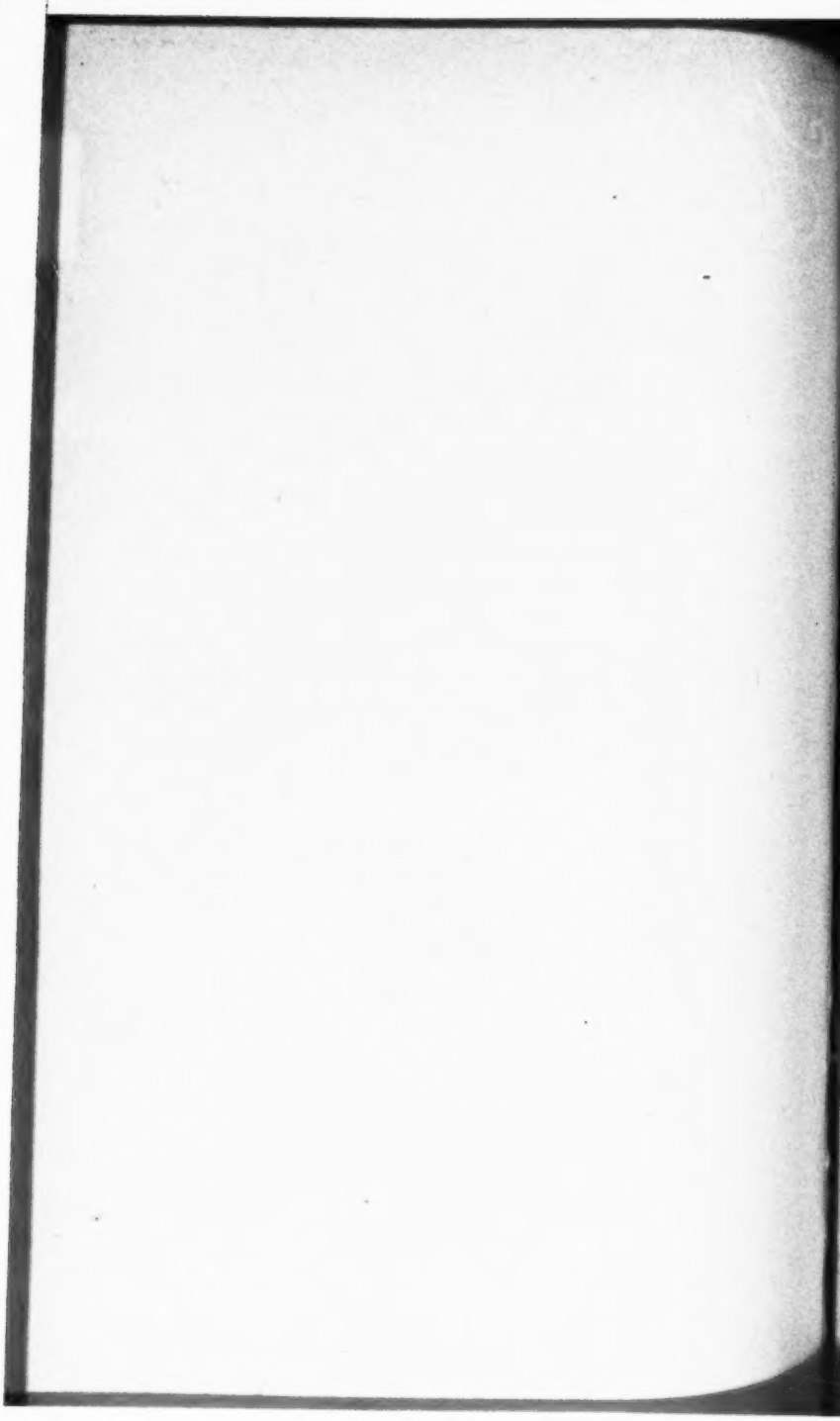
"of the insurance money applied thereto, shall be a "credit on the amount for which we have become "bound by this obligation.

(Signed)

"EMANUEL WERTHEIMER. (Seal.)
"W. L. KANN." (Seal.)

Therefore, if it be decided that the Penn Company was under no legal obligation to insure for the benefit of the mortgage, the bond holders and the trustee had no one to blame but themselves for any loss which may be sustained; as they saw fit, after full notice, to take the chance of the legal question being decided in their favor.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
For Appellees.



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JAMES H. McKENNEY,

No. 180.

Brf. of Marshall for

# Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed April 23, 1902

No. 180.

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THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, PETITIONER,

*vs.*

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN.

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On Writ of Certiorari to the United States Circuit Court of Appeals.

## BRIEF FOR APPELLEES.

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LOUIS MARSHALL,
*Of Counsel.*

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APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1901.

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| THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Petitioner,<br><br>vs.<br><br>THE PENN PLATE GLASS COMPANY and William L. Kann. | No. 180. |

## Brief for Appellees.

The brief already filed on behalf of the appellees so fully treats of the questions involved, that but little need be added to what has already been said, except by way of supplemental authority and of restatement.

## POINTS.

### I.

### The mortgage of the Pennsylvania Plate Glass Company to the petitioner contains no covenant on the part of the mortgagor to insure the mortgaged premises.

(*a*) The mortgage contains no express covenant

or stipulation on the part of the mortgagor to insure for the benefit of the mortgagee and bondholders, unless such covenant is contained in the tenth article.

(*b*) A covenant on the part of the mortgagor to insure will not be implied.

*Columbian Ins. Co. v. Lawrence*, 10 *Peters*, 507.
*Carpenter v. Providence Ins. Co.*, 16 *Peters*, 495.

(*c*) The tenth article of the mortgage refers to the relation between the trustee and its *cestuis que* trust—the bondholders—and not to the relation existing between the mortgagor and the trustee.

This is evident from an examination of each of the five paragraphs of which this article consists.

(1) The first of these paragraphs declares that the right of action under the mortgage is vested exclusively in the trustee, and specifies the single instance in which the bondholders may sue. It absolves the trustee from the obligation of suing or of taking any proceedings under the indenture until indemnified for all possible expenses, disbursements and damages to its satisfaction, reserving to it the right, however, of beginning suit or of doing anything else in its judgment proper to be done without such indemnity, in which event compensation out of the trust fund is provided for.

(2) The second paragraph absolves the trustee from the obligation of recognizing any person as holder of any of the bonds secured under the mortgage, or to do or refrain from doing any act pursuant to the request or demand of any person, until

such supposed holder or owner shall produce his bonds and deposit them with the trustee.

(3) The fourth paragraph declares that whenever it is necessary or proper for the trustee to make any investigation preparatory to taking or not taking any action, or of doing or not doing any thing, as trustee, the certificate of the mortgagor, under its corporate seal, attested by the certificate of its president, or the affidavits of one or more directors, shall be conclusive evidence of such fact, to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

(4) The last paragraph of the article discharges the trustee from responsibility as to the correctness of any recital, statement of fact or representation made in the mortgage by the mortgagor, and further declares that it is not to be understood as making any representations as to the character, extent or value of the mortgaged property, or as to the title thereto.

(5) The third paragraph, on which the petitioner rests its argument, clearly purports to regulate or qualify the obligation of the trustee to the beneficiaries of the trust, and does not assume to contain any stipulation or covenant from the mortgagor to the mortgagee:

"It shall be no part of the duty (of the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage or to renew such mortgage, or to procure any further, other or additional instrument or further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof or for giving notice of the existence of such lien, or for extending or supplementing the same."

Each of these acts refers to a duty which, but for this provision, might properly be claimed was owing from the trustee to its beneficiaries. It was immaterial to the mortgagor as to whether the mortgage should be filed or recorded, or whether it should be renewed, or whether or not additional instruments or further assurances should be executed, or any act done to perpetuate the lien or extend or supplement it, or to give or withhold notice of its existence. These acts all related to the protection of the bondholders and their trustee was speaking to them and not to the mortgagor, the latter occupying a position of positive indifferene so far as they were concerned.

Then follows the further clause in the same paragraph, separated only by a semi-colon from the provisions which have just been read.

"Nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property; or to renew any policies of insurance; or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payments to be made."

Here, in like manner, the trustee is dealing with the bondholders and is stipulating for exemption from liability in the event that it shall fail to effect insurance, to renew policies, to keep itself informed or advised as to the payment of taxes or assessments, or as to requiring payment therefor to be made.

Then in the same sentence, and in connection with the antecedent clauses which have just been quoted and which clearly relate to a stipulation between the trustee and the bondholders, come the words "*but* the *trusteee* may in its discretion *do* "any or all the matters and things in this "paragraph set forth, or require the same to be "done."

It is not stated who may be required in the trustee's discretion to do these matters or things. The mortgagor does not declare that it will do them. The permission granted to the trustee is not a covenant on the mortgagor's part. "The matters and things in this paragraph set forth" are not of such a character as would lead it to be selected for doing them, or impose upon it any obligation with respect thereto, or to lead it to be considered as the proper party to perform them. Thus, for illustration, who would ever contemplate the selection of the mortgagor as the proper party to file or record the mortgage, or to initiate proceedings for the procurement of further assurance?

The rule *noscitur a sociis* and the principle of construing words *ejusdem generis*, sustain the contention that the clause now under consideration does not embody a covenant on the part of a mortgagor.

This is likewise a case for the application of the rule, that when general words occur at the end of a clause or sentence they refer to and qualify the whole. Read in the light of these causes of interpretation, it is difficult to invest a covenant on the part of the mortgagor, from these unwilling words.

*Dwaris on Statutes, 704.*
*2 Institutes, 50.*
*Gyger's Estate, 65 Pa. St. 311.*
*Eby's Appeal, 70 Pa. St. 311.*
*Fisher v. Connard, 100 Pa. St. 63.*
*United States v. Babbitt, 1 Black, 55.*
*Great Western Ry. Co. v. Swindon Ry. Co., L. R. 9 App. Cases, 787.*
*Corson v. Dolan, 2 Daly, 66.*

The absence of the intent of imposing a covenant

with respect to insurance on the mortgagor, is further evidenced by the words immediately following:

"It (the trustee) shall only be responsible for reasonable diligence in the performance of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion."

Here, again, the instrument gives expression to the paramount idea that the trustee is stipulating with the bondholders for immunity and is not concerning itself with the mortgagor; nor is the latter in anywise interested or concerned in the numerous stipulations contained in the tenth article which bear upon the relations between the trustee and the bondholders.

(*d*) The implication of a covenant on the part of the mortgagor from language bearing upon the relations between the trustee and the bondholders would be most extraodinary.

The draftsman of this instrument understood the nature of a covenant, and if it had been intended to impose upon the mortgagor the duty of insuring the property for the benefit of the mortgagee it would have been both simple and natural to have imposed such obligation in unambiguous language, with ample provisions as to the extent of insurance, with a specification that the insurance should be taken out for the benefit of the mortgagee, and with the usual provisions contained in covenants to insure.

The omission of such a provision when coupled with the language of the fourth article, which exempted the mortgagor from personal liability for the indebtedness secured by the mortgage, and the manifest intention that the mortgaged property

should be the sole security of the bondholders and of the mortgagee, indicates that the implication of a covenant from the language relied upon would do violence to the intention of the parties.

The clause from which the covenant is sought to be deduced begins with the disjunctive "but" which creates a proviso or condition, but not a covenant.

As was said by Mr. Justice Harlan in *Hale v. Finch*, *104 U. S., 261, 269*, where it was intended to charge defendant with a covenant not to use a certain steamboat within ten years on certain routes of travel and to hold him responsible for the breach of such implied covenant:

"But according to the authorities, including some of those above cited, and from the reason and sense of the thing, *a covenant will not arise unless it can be collected from the whole instrument that there was an agreement or promise, or engagement upon the part of the person sought to be charged, for the performance or non-performance of some act* * * * There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement that the sale was upon an express condition that neither the boat nor its machinery should be used within a prescribed time upon certain waters. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement or promise by the vendee that he would personally perform, or become personally responsible for its performance."

Moreover, if it had been intended to impose any further covenants upon the mortgagor it would have been but natural that such covenants would have been inserted in article sixth, which contains the only formal covenant assumed by the mortgagor. That, however, is merely a covenant of

further assurance and, under the circumstances, the omission of any other covenant affords a strong ground for the application of the maxim *expressio unius exclusio alterius.*

This branch of the case has been so elaborately and ably considered in the opinion of Judge Gray in the Circuit Court of Appeals (*103 Fed. Rep., 132*) that further discussion seems unnecesary.

If his views on this proposition are adopted we can rest the argument here, since it would necessarily follow that if the mortgagor was under no obligation to insure for the benefit of the mortgagee, subsequent grantees would certainly not rest under such a duty.

## II.

**But assuming that the tenth article of the mortgage can be tortured into a covenant on the part of the mortgagor to insure, such covenant was personal in its nature, did not run with the land, and, therefore, conferred no right in the mortgagee to the proceeds of the insurance policies taken out by the appellees.**

(*a*) It may be useful to first consider the nature of a contract of insurance procured by the owner of the equity of redemption of mortgaged property, in order to show that the proceeds of such a policy do not represent the property, and, in the absence of special covenant, do not inure to the benefit of the mortgagee.

In *Carter v. Rockell, 8 Paige, 436*, it was decided that where the owner of mortgaged premises

insures them for his own benefit and the premises are destroyed by fire, the mortgagee is not entitled to the money payable by the insurers on account of such loss, although the insured was personally liable for the debt secured by the mortgage.

In *Columbian Ins. Co., v. Lawrence, 10 Peters, 501, 512*, the Court said:

"We know of no principal of law or of equity by which a mortgagee has a right to claim the benefit of a policy, underwritten for the mortgagor, on the mortgaged premises in case of a loss by fire; it is not attached or an incident to the mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

In *Carpenter v. Providence Washington Ins. Co., 16 Peters, 495*, this language was quoted with approval by Mr. Justice Story, who further held, that when the insurance is made by the mortgagor he can, notwithstanding the mortgage or incumbrance, insure for and recover the full value of the property, but that the mortgagee, although he has an insurable interest, can only insure the amount of his debt.

In *Gleason v. First National Bank of Lapeer, 13 Fed. Rep., 720*, Judge Brown said:

"We do not dispute plaintiff's contention that a policy of insurance is a personal contract; that a mortgagor and a mortgagee, or other owner and lienholder, have separate insurable interests, and that the right of subrogation does not exist as between them. If the mortgagor insures the mortgaged property in his own name and it is burned, the money belongs to him and not to the mortgagee, though the latter may thereby lose his whole debt."

*Nippes' Appeal, 75 Pa. St., 478*, a husband made a voluntary conveyance of land to his wife,

subject to the lien of a mortgage, procured the property to be insured for his benefit and thereupon his creditors after the occurrence of a fire sought to reach the insurance money claiming that the transfer was fraudulent and that the money collected on the policy represented the insured property. Mr. Justice Sharswood, however, said:

"But apart from all this, what did the fund in Court represent? Not the property insured, whether real or personal, but the insurable interest of Mrs. Nippes in that property. If she had no insurable interest the policy was void—but that was a question exclusively between her and the insurers. They paid the money into Court at her suit. What title did her husband's creditors show to any part of it? How was the insurance, admitting it to have been effected by the husband, with his own money, any fraud upon them unless to the extent of the premiums? We have no evidence indeed that these premiums were paid with the husband's money, but the wife being the owner of the farm, residing upon and being entitled to its produce, the presumption is that the money with which the insurance was effected was her own. Had the property been destroyed by fire without insurance where would the creditors have been? It is plain the insurance made them no worse. Policies of insurance against fire are not deemed in their nature incidents to the property insured, but they are mere special agreements with the person insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee, mortgagee, creditor or otherwise, may sustain by reason of the subsequent destruction by fire. (Carpenter v. Providence Washington Insurance Co., 16 Peters, 495). If creditors have a lien by mortgage, judgment or execution, they can insure their own interest, but they can have no right to attach insurance money due to any one but their own debtor."

In *Lerow v. Wilmarth, 9 Allen, 382*, it was held that one who has received personal property by a conveyance which is fraudulent as against creditors, has nevertheless an insurable interest therein, and in case of loss by fire is entitled to hold the money received upon such insurance against the creditors. Chief Justice Bigelow said:

"The rights of creditors were not interfered with or impaired by the insurance effected upon the property for her (the grantee's) benefit. It was a valid contract which she had a right to make and the benefit which accrued to her from it could not be defeated by other persons upon the ground that she held the property by title which in a certain contingency might be defeasible. It cannot be said that the money received on the policy stands in the place of the property destroyed. It is in no proper or just sense the proceeds of the property. It is a sum paid by the insurer in consideration of a certain premium as an indemnity for the loss of property in which the person insured has a legal and insurable interest."

To the same effect is *Loos v. Wilkinson, 113 N. Y., 500.*

(*b*) It being thus clear that the proceeds of a policy of insurance do not represent the mortgaged property, and in the absence of a specific agreement on the part of the owner of the mortgaged premises do not inure to the benefit of the mortgagee, it becomes important to consider whether the appellees, who procured the insurance in the present case, became bound by any contract, to which they were parties or privies, to procure insurance for the benefit of the petitioner.

1. That they did not intend to do so is demonstrated by the language of the policies procured by them, which expressly excluded the interest of the bondholders by the following clause:

"This property is subject to a mortgage of $250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders."

No language could more clearly disclaim the right of the mortgagee to any interest under these policies; and yet it is claimed on behalf of the petitioner that on some theory of implied contract, based upon rules of natural justice, equity will impute an intention to the appellees to do that which their express language negatived. Such an implication will not be indulged.

In the language of Mr. Justice Clifford in *Hawkins v. United States, 96 U. S., 697*:

"Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum*. Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. *Chitty Contracts (10th Ed.) 62.*"

2. Not only did the appellees express their intention that this insurance should not inure to the benefit of the mortgagee, by the express terms of the contract of insurance, but when called upon by the petitioner to procure policies of insurance for its benefit they disavowed any obligation to procure it, and gave the petitioner ample opportunity to procure such insurance for its own benefit, in the exercise of its undoubted right.

*Insurance Co. v. Stinson*, 103 U. S., 25.
1 *Jones on Mortgages*, §397.

3. There being thus no contract between the petitioner and the appellees by which the latter

undertook to procure insurance for the benefit of the former, the only question that remains to be considered in this connection is whether, on the assumption that the mortgagor was bound by a covenant to insure, such covenant was binding on the appellees as subsequent grantees of the mortgaged premises.

A re-examination of this alleged covenant may be useful for the purpose of determining its character and extent.

As has already been said it is not in terms a covenant on the part of the mortgagor to procure any insurance. Still supposing that a covenant is to be spelled out from the language employed, what does the mortgagor, covenant to do? Not to effect insurance for any particular amount; nor that the insurance shall be for the benefit of the mortgagee. All that is said on that subject is, that "it shall be no part of the duty of the mortgagee to effect insurance against fire, etc., but it may in its discretion do any or all of the matters and things in this paragraph set forth, or require the same to be done."

4. The covenant sought to be inferred would be satisfied by insurance effected for the benefit of the mortgagor.

In *1, Jones on Mortgages (5th Ed.), §401,* that learned author, citing *Lees v. Whiteley, L. R. 2 Eq., 143.* says:

"It has even been held that a mere convenant by the mortgagor to effect insurance, without any stipulation that is for the benefit of the mortgagee or that the loss shall be paid to him, does not imply that the mortgagor shall apply the insurance money either in discharge of the mortgage debt or in restoration of the property. A covenant to effect insurance is not without meaning, to

without advantage to the mortgagee, although it be not either expressly or impliedly made for his benefit."

5. But proceeding even further with our assumption, and treating the alleged covenant as one to insure for the benefit of the mortgagee, it is nevertheless insisted that that covenant is a personal covenant which does not bind subsequent owners of the property, because it is not a covenant running with the land.

In *Dunlop v. Avery, 89 N. Y. 592*, Judge Miller said :

"Nor is there any force in the position that the covenant to insure runs with the land, and hence no assignment was required of the policy * * * The covenant in question is entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage. A conveyance of the land by the mortgagor would not, we think, render the vendee liable on the covenant. See *Platt on Covenants, 183; Platt on Leases, 226 228; Newman v. Wells, 17 Wend, 150.*

In *Reid v. McCrum. 91 N. Y., 412*, the same doctrine was announced after a careful re-examination of the authorities; and it is also recognized by the text writers.

*1 Jones on Mortgages (5th Ed.) § 400.*
*2 May on Insurance, §452.*
*1 Biddle on Insurance, §254.*

6. Even if this were a covenant running with the land, the remedy of the petitioner for a breach of such covenant on the part of the appellees would not be to reach the proceeds of the insurance policies, which upon their very face evidenced an intention that they should not inure to the

benefit of the mortgagee, but the measure of the petitioner's recovery for such breach would have been limited to the cost of such insurance as the mortgagee might have effected for its benefit.

7. The rule amended in *Stearns v. Quincy Mutual Fire Insurance Company*, *124 Mass., 61, 64*, likewise debars the petitioner from the benefit of this insurance.

The petitioner, ignoring the contentions, seeks to deduce an argument from the fact that the conveyances to the appellees were made "subject" to the petitioner's mortgage, and the assumption that such mortgage contained a covenant to insure for its benefit. That argument will now be dealt with.

## III.

**The conveyance to the Penn Plate Glass Company did not impose upon it any duty in favor of the mortgagor to insure the buildings for the indemnification of the mortgagee, and hence no equities can be deduced from such conveyance in support of its mortgagee's contention.**

The petitioner's argument under this head is based entirely on the fact that the conveyance from William L. Kann to the appellee was "*subject to the mortgage*" executed by the Pennsylvania Plate Glass Company to the petitioner. It is claimed that the acceptance of this deed created an obligation on the part of the appellee to the Pennsylvania Plate Glass Company for its indemnification which is enforcible by the pe-

titioner directly against the appellee in order to avoid circuity of action.

Without at this time considering the soundness of the proposition, it is important preliminarily to call attention to a number of essential facts which have been ignored in the petitioner's argument.

(*a*) After the execution of the mortgage in controversy a suit in equity was brought in the Court of Common Pleas of Westmoreland County, Pennsylvania, for a decree of insolvency, the dissolution of the corporation, and the appointment of a receiver. In that suit Joseph W. Stoner was appointed such receiver and all of the property of the corporation was turned over to him for administration under the direction of the Court, and pursuant to the decree rendered in the action he became vested with the property which was described in the mortgage, as the successor of the Pennsylvania Plate Glass Company.

(*b*) Pursuant to a decree rendered in the cause in which Stoner was thus appointed receiver, he was directed to sell the property covered by such mortgage "subject to the lien of the first mortgage "of Two hundred and fifty thousand dollars to "secure the payment of bonds; which said mort-"gage was recorded in Westmoreland County in "Mortgage Book 43, page 1."

(*c*) Stoner, as Receiver, exposed for sale at public auction the plant of the Pennsylvania Plate Glass Company on June 18th, 1894, in pursuance of the decree, and it was sold to William L. Kann "subject to the lien of the first mortgage of two "hundred and fifty thousand dollars with interest "thereon"; and the conveyance executed by the receiver recited that the conveyance was accepted by the grantee "subject to the mortgage."

(*d*) On July 1st, 1895, William L. Kann and wife conveyed to the Penn Plate Glass Company the same property, "subject to the mortgage," and it is on this conveyance that the petitioner grounds it argument.

(*e*) The Pennsylvania Plate Glass Company at the time of the rendition of the decree against it was hopelessly insolvent. All of its property and assets have been disposed of and distributed. It has never paid to the petitioner any sum whatsoever on account of the principal secured by the mortgage, or under any of the covenants therein contained. The petitioner, although notified that the appellees declined to effect insurance in its behalf, did not insure, and hence has no claim against the mortgagee for premiums. The latter has ceased to exist for all practical purposes and is not in a position to respond to any claim, judgment or decree that may be rendered against it, as it has been stripped of every remnant of its property (Rec., pp. 469-471; *Cowen v Pennsylvania Plate Glass Co., 184 Pa. St., p. ; s. c., 38 Atl. Rep., 1075*).

(*f*) Article Fourth of the mortgage in suit contains the following provision:

"It being expressly understood by and between the parties hereto and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons, shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same or any of them may be assigned or trans-

ferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

(*g*) The bonds secured by this mortgage provide that they are "equally secured by a certain deed "of trust or mortgage, bearing even date herewith, "conveying the property and franchises of the "company, more particularly described therein, "unto the Farmer's Loan and Trust Company, "*to which reference is hereby made for the terms* "*and conditions upon which this bond is issued* "*and for the rights and remedies of the holder* "*hereof.*"

From these facts it is clear:

(1) That the remedies of the bondholders and of the mortgagee were confined to the property mortgaged, and that no personal liability for the indebtedness secured by the mortgage was imposed on the mortgagor, its officers, directors or shareholders;

(2) That neither of the appellees assumed the payment of the mortgage or accepted a conveyance *subject to the payment of the mortgage*, nor

did they by any similar language indicate the purpose or intent of undertaking any personal liability therefor;

(3) That there was no direct conveyance from the Pennsylvania Plate Glass Company to Kann, or to the appellee their immediate grantor being Stoner as receiver. In the intermediate link of title—the decree of insolvency pursuant to which Stoner was appointed receiver—there was no provision by which the receiver, or the Court, accepted title to the mortgaged property "subject to the mortgage."

*I. There having been no assumption of the payment of the mortgage by the appellees, or the acceptance by them of a conveyance subject to the payment of the mortgage, they did not become chargeable with the obligations or covenants, if any, imposed upon the mortgagor by the terms thereof.*

The rule, as laid down in numerous cases, is well expressed in *1 Jones on Mortgages (5th Ed. §738*, as follows:

"If the purchaser buys a mere equity of redemption, he is not personally liable for the mortgage debt; or liable either legally or equitably to indemnify his grantor against the mortgage. He may give up the property at any time in satisfaction of the lien. The mortgage debt remains an incumbrance upon the estate, and a debt of the mortgagor, but not a debt of the person buying. In the absence of a special agreement to assume the mortgage or words in the grant importing in some form that he assumes the payment of it, the purchaser is not personally liable for it."

In *§748* the author says:

"A deed which is merely made subject to a mortgage specified does not alone render the grantee

personally liable for the mortgage debt. To create such liability there must be such words as will clearly import that the grantee assumed the obligation of paying the debt."

From among many cases which may be cited in support of this proposition the following are selected:

*Shepard v. May*, *115 U. S.*, *505*.
*Elliott v. Sackett*, *108 U. S.*, *132*.
*Fiske a. Tolman*, *124 Mass.*, *254*.
*Belmont v. Coman*, *22 N. Y.*, *438*.
*Hoy v. Bramhall*, *19 N. J. Eq.*, *74*.
*Chilton v. Brooks*, *71 Md.*, *45*.
*Dean v. Walker*, *107 Ill.*, *540*.
*Smith v. Truslow*, *84 N. Y.*, *660*.

In *Elliott v. Sackett*, *108 U. S.*, *140*, Mr. Justice Blatchford said:

"An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt, to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee."

In *Shepherd v. May*, *115 U. S.*, *505*, Mr. Justice Woods said:

"We have under this assignment of error to decide whether, by the mere conveyance of the premises in question to Walker by Shepherd, subject to the encumbrance created by the deed of trust, Walker became bound to May as principal debtor,

and Shepherd became his surety. We are of opinion that the conveyance of the premises to Walker did not subject him to any liability to May whatever. To raise such a liability, as is contended for by Shepherd, there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred."

In *Keller v. Ashford, 133 U. S. 610*, the deed contained express words of assumption, the language being "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by the grantee." Yet it was held that such an agreement was a contract between the grantee and the mortgagor only, and did not, unless assented to by the mortgagee, create any obligation from the grantee to the mortgagee.

The opinion of Mr. Justice Gray recognized the doctrine of *Elliott v. Sackett* and *Shepherd v. May*, and adopted the *ratio decidendi* of *Crowell v. St. Barnabas Hospital, 12 C. E Green, 650*, to the case then under consideration, which, as has been seen, was one of express assumption by the grantee of the payment of the mortgage:

"But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, *unless the grantor was himself personally liable for the payment of the mortgage debt.*

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent pur-

chaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt and then driven to seek relief over against the person who has indemnified him, and upon him the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor."

In the present case this reasoning does not apply.

(1) Because there was no assumption of payment of the mortgage by the grantees;

(2) Because the mortgagor was not personally liable for the payment of the mortgage debt;

(3) Because, under the circumstances (the mortgagor could not have been damnified, and, hence there was no occasion to avoid circuity of action.

The rule as announced by the authorities has in Pennsylvania been made even more emphatic by the act of June 12, 1878; (*Brightlys Purdon's Dig. 2930; Pamph. L. p. 205*), as follows:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other encumberance, shall not be personally liable for the payment of such ground rent, mortgage or other encumberance unless he shall by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability; provided that the use of the words

'under and subject to the payment of such ground rent, mortgage or other encumberance' shall not alone be construed so as to make such grantee personally liable as aforesaid. The right to enforce such personal liability shall not inure to any person other than the person with whom such agreement is made; nor shall such liability continue after the said grantee has parted *bona fide* with such encumbered property, unless he shall have expressly assumed such continued liability."

It is difficult to see how, under the language of this act, reading it in connection with the previous decisions, a deed which is made subject to a mortgage merely can be made the basis of any obligation on the part of the grantee either by way of assumption or indemnity.

(*a*) The possibility of personal liability is absolutely excluded in express terms.

(*b*) Under previous decisions personal liability for a deficiency had resulted where the conveyance was merely made "subject to a mortgage"; hence the proviso contained in the act must have been intended to abolish the theory of liability based on a contract of indemnity.

(*c*) The right to enforce the personal liability created by a contract of express assumption, was limited to the person with whom such contract was made. How then can it be argued that the lesser contract of indemnity would inure to any person other than the one with whom such contract of indemnity was made.

Here, no agreement was made between the petitioner and the appellees; nor was there any agreement made between the Pennsylvania Plate Glass Company and either of the appellees. The conveyance whereby Kann acquired the property was from Joseph W. Stoner, as receiver of the Penn-

sylvania Plate Glass Company, and the deed under which the Penn Plate Glass Company acquired the property was from Kann.

The case of *Moore's Appeal, 88 Pa. St., 454,* arose before the Act of 1878. In *Blood v. Crew Levick Co., 171 Pa. St., 378,* the conveyance contained an express covenant by the grantee to pay the mortgage debt, the language being "it is "hereby agreed between the parties to this instru- "ment that the said party of the second part ac- "cept the title * * * subject to the payment "of the mortgages herein mentioned." Moreover the action to enforce the covenant was brought by the vender, and not by the mortgagee. Hence the Court held that the Act of 1878 played no part.

But it is difficult to conceive what function that act can perform if, under the theory of a contract of indemnity the same result can be accomplished as would follow from an express contract of assumption. The legislature evidently intended to relieve grantees who took conveyances "subject to mortgages," from any potential liability, in consequence of the acceptance of such a conveyance, and to treat such a clause as merely expressive of the idea that the grantee took his conveyance with notice of an existing paramount lien, and nothing else.

(4) That the mortgagor has not been and cannot be damnified by reason of any claim made against it by the petitioner.

It is difficult to understand how any equities in favor of the petitioner and against the appellee can be deduced from the fact that the conveyance to the latter from Kann, and to him from the receiver of the Pennsylvania Plate Glass Company, was "subject to the mortgage" executed by that corporation to the petitioner.

*II. Assuming, but not conceding, that under the decisions in Pennsylvania a conveyance of land "subject to a mortgage" or other incumbrance is a covenant of indemnity for the protection of the vendor only, the record shows that the Pennsylvania Plate Glass Company, treating it as the appellee's vendor, cannot possibly be damnified. Hence no equities can arise under any fancied covenant of idemnity.*

(*a*) As has been seen, the bonds secured by the mortgage refer to the latter instrument, whose terms and conditions must be deemed embodied in the bonds, and the rights and remedies of the holder are such only as are conferred by the terms of the mortgage, which exclude the idea of personal liability on the part of the mortgagor.

*McClellan v. Norfolk Southern R. R. Co., 110 N. Y., 469.*
*Batchelder v. Council Grove Water Co., 131 N. Y., 42.*

It follows that if the mortgagor cannot be charged with liability for the indebtedness secured by the mortgage, there is nothing for a covenant of idemnity to operate upon. Where there can be no damage or liability, idemnity has no function to perform.

(*b*) Not only is this case destitute of any foundation for the claim of idemnity because of a non-existing liability, but by reason of inability of the mortgagor to respond for liability, even if it existed, the appellee could in no event be called upon to make good a loss which has not been suffered.

This becomes clear from an examination of the authorities.

*King v. Whitely*, *10 Paige*, *465*, is one of the leading cases on the subject. There it was held that, where a *grantee* of the equity of redemption in mortgaged premises, who was neither legally nor equitably interested in the payment of the bond and mortgage, except so far as the same was a charge on his interest in the premises, conveyed the mortgaged premises "subject to the mortgage," and the conveyance recited that the grantees therein assumed the payment of the mortgage and were to pay off the same as a part of the consideration for such conveyance, since the *grantor* was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable for any deficiency that might arise upon a foreclosure sale of the mortgaged premises.

In *Trotter v. Hughes*, *12 N. Y.*, *74*, this decision was followed and applied, the Court deciding that where the grantor of mortgaged premises is not personally holden for the debt, and the conveyance from him contains covenants of seizin and warranty, and a statement that the premises are subject to the mortgage, the grantee is not personally liable for the mortgage debt or any part of it.

It was further followed in *Garnsey v. Rogers*, *47 N. Y.*, *233*, and *Vrooman v. Turner*, *69 N. Y.*, *280*, in the latter of which cases Judge ALLEN, after carefully reviewing the authorities, said (p. 283):

"The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle and is not inconsistent with that class of cases in which it has been held that a promise to

one for the benefit of a third party may avail to give an action directly to the latter against the promissor, of which *Lawrence v. Fox* (*20 N. Y., 268*), is a prominent example. To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

To the same effect is *Durnherr v. Rau*, *135 N. Y., 219*.

In *Moore's Appeal*, *88 Pa. St., 450*, Chief Justice Sharswood, commenting upon the effect of a conveyance "subject to a mortgage," and declaring it to be a covenant of indemnity only, said:

"Why should a covenant be inferred from these words by the vendee to the vendor to do more than protects the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist why should he exact anything more than indemnity? Surely then something should appear to create the inference of such a covenant. The words 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most that so taking it, at an agreed consideration, which includes the incumbrance, he will indemnify the vendor to the extent of that consideration, in the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the com-

mon use of language, they were entering. The Act of Assembly of June 12, 1878, Pamph. L., 205, has very wisely provided that the grantor shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance."

In *Samuel v. Peyton, 88 Pa. St., 465*, it was held that where by an agreement between the first grantee of premises with the original mortgagee, said grantee was not to be personally liable on the mortgage, a subsequent grantee is not made so by reason of the "under and subject" clause in the mortgage.

Chief Justice Sharswood, after referring to his opinion in *Moore's Appeal* (*supra*), added:

"It was shown in that case, on a review of the authorities, that it was only where there was an express agreement to pay the encumbrance, or where such agreement might be implied from the circumstance that there was liability to the encumbrancer, or that he could sue in the name of the vendor to his use. The vendor must sue, and must show that he has been damnified, or at least must show that his danger of damnification is imminent. The special pleas in this case not only expressly denied any agreement by the defendant to pay the mortgage, but averred a state of things which showed that the vendor never could be damnified. If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting."

See also

*Girard Life Insurance & Trust Co. v. Stewart, 86 Pa. St., 89.*

In *Blood v. Crew Levick Co., 171 Pa. St., 328; s. c. 33 Atl. Rep., 344*, it was held that the vendor of land "under and subject to the lien of" a mortgage has no right of action against the purchaser on account of such stipulation until he has actually paid the mortgage debt, or until the land has been withdrawn from the reach of the holder of the mortgage. Mr. Justice Williams said:

"As to the amount still due and unpaid on the mortgages on the freehold estates, the plaintiff cannot recover to her own use until she has been compelled to make payment, and then only to the extent of the payments actually made. * * * As to the mortgage on the leaseholds, the vendor took no express covenant and must depend upon that which the law implies from the 'under and subject to the lien of' clause. The effect of the implied covenant is to make the land primarily liable for the mortgage debt, the vendor becoming as between the vendee and himself, bound to provide for the payment of the mortgage. The vendee undertakes, on the other hand, that the land shall remain liable to seizure and sale for the payment of the mortgage debt, and that he will do no act which shall tend to withdraw it from the reach of the creditor or prevent the fair application of its full value to the debt * * * The facts contained in the case stated are not as full as might be desired, but they do not show that the plaintiff has been compelled to pay the leasehold mortgage, or any part of it, either in money or by an application of it to the extinguishment of any demand due to the estate of her deceased husband, nor that the land has been withdrawn from the reach of the holder of the mortgage."

The right for which the petitioner contends under the view most favorable to it, must be a derivative right, coming through the mortgagor. If the latter's right never accrued the former's would never spring into existence.

*III. The grantor of Kann—the Receiver of the Pennsylvania Plate Glass Company—having acquired the property conveyed by him pursuant to a judicial decree, and being bound by no covenant of indemnity, there is no privity between the petitioner, as mortgagee, and the appellee which, under any circumstances, would bind the latter to the former.*

This is most conclusively shown by the language of Chief Justice Sharswood in *Samuel v. Peyton* (*88 Pa. St., 465*), which has already been quoted:

"If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting."

In other words, the liability of the grantee depends on that of his immediate grantor. If the nexus between the mortgagor and the appellees is broken, the mortgagee cannot successfully bridge the gap. Or as the idea has been elsewhere expressed:

"Since the mortgagee upon this theory proceeds against the grantee not in his own right, but by subrogation to the rights of the grantor, it necessarily follows that if the grantor was not originally liable or if before the action is brought, such liability has ceased to exist, the mortgagee cannot recover against the grantee."

See

*Trotter vs. Hughes* (*supra*).
*King vs. Whitely* (*supra*).
*Biddle vs. Pugh*, *57 N. J. Eq.*, *480*.
*Eakin vs. Schultz*, *47 Atl. Rep.*, *270*.

## IV.

**The petitioner while constrained to concede that the appellees are not liable under the terms of their conveyances on any contract of indemnity so far as the mortgage debt is concerned, because the mortgagor was under no covenant to pay such debt, nevertheless asserts that the obligation of imdemnity applies to the alleged covenant to insure. This contention is unsound.**

(*a*) The covenant to insure (assuming that such a covenant can be implied) was at most a mere incident to the obligation of the mortgagor, and a collateral agreement. If there was no obligation on the part of the mortgagor to pay the debt which was secured by the mortgage, then it would seem that the incident would fall with the principal. Hence, if there was no enforcible contract of indemnity so far as the principal was concerned, how can it be said that there was such an obligation with respect to the incidental covenant to effect insurance?

(*b*) The covenant to insure being personal in its nature, and not one running with the land, it is difficult to understand how the acceptance of a conveyance "subject to the mortgage" and which did not impose any obligation on the grantee so far as insurance was concerned, can operate as a contract of indemnity with respect thereto.

(*c*) Treating this case as though the Pennsylvania Plate Glass Company had undertaken to enforce the contract of indemnity against the appellees with respect to the covenant to insure, what

would have been the rule of damage? That company could only recover a sum equal to the amount which it could be compelled by the petitioner to pay to it by reason of a breach of the alleged covenant to insure. Inasmuch as the mortgagor was under no covenant to pay the indebtedness, the amount of such indebtedness could not have been the measure of damage.

The value of the mortgaged property would not have been the reasonable, probable or proximate amount of damage resulting from the failure to insure. At the most the amount expended in the procurement of insurance would have been recoverable by the petitioner from the mortgagor.

In *Dodd v. Jones*, *37 Mass.*, *322*, in an action for breach of an agreement to assign a policy of insurance upon a house sold by the defendant to the plaintiff, by reason of which the policy became void, it was held that the measure of damages (the plaintiff having procured no new insurance) is the cost of insurance for the unexpired term of the policy and not the amount of the injury resulting from the subsequent burning of the house. Mr. Justice Allen said:

"The agreement was not a contract of insurance but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff would procure

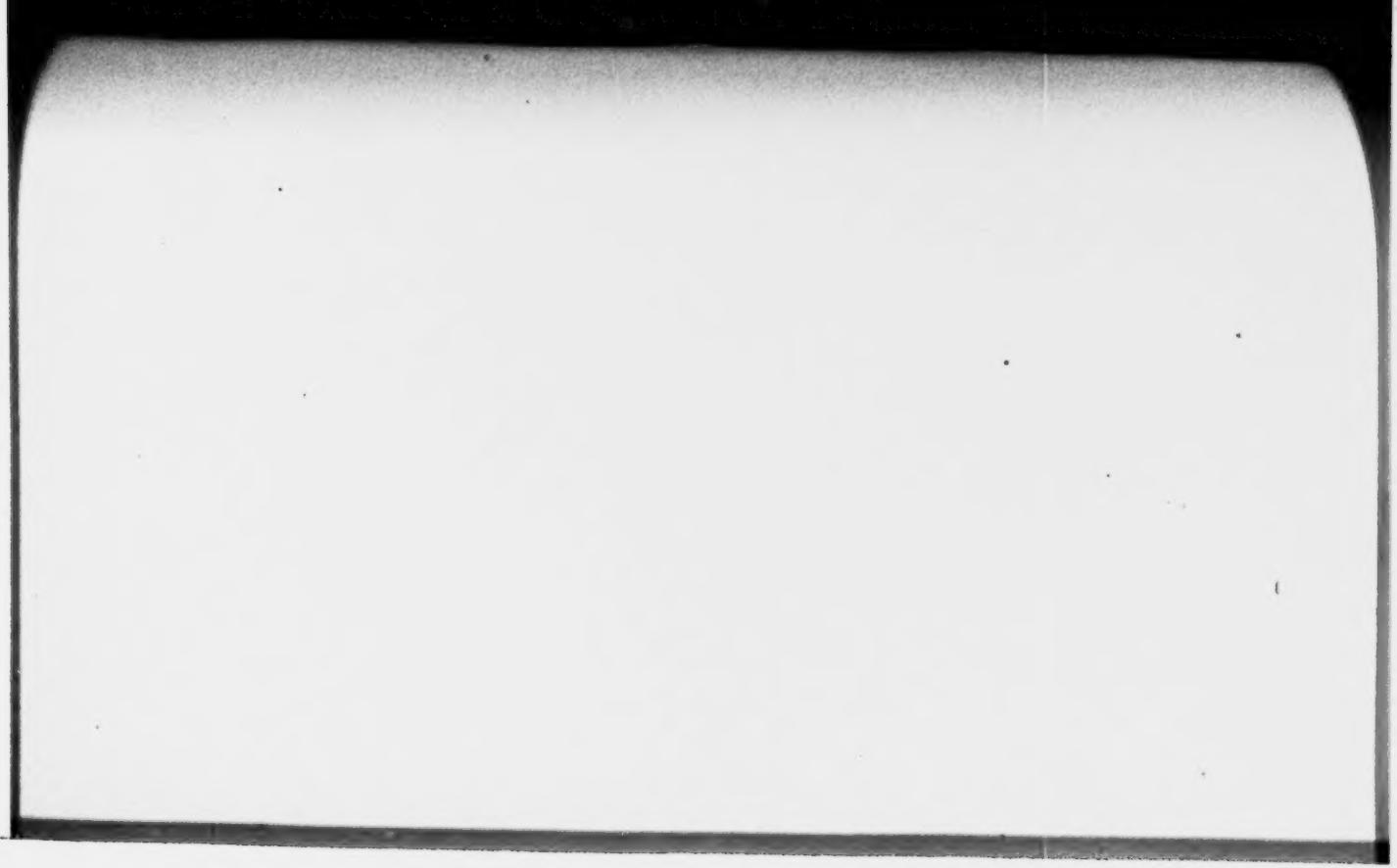
another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that."

In *National Mahaiwe Bank v. Hand, 80 Hun, 584*, the defendant leased from the plaintiff a building for a term of years, with the right to purchase upon compliance wtih the conditions therein named, and the lessee covenanted "to keep in force in insurance on said property for the benefit of said bank (the lessor) in the sum of $10,000, in such companies as said bank shall approve." No policy of fire insurance was issued covering the building and it was subsequently destroyed by fire. It was held, following the case just cited, that the measure of damages was not the amount of insurance stipulated for, but the cost of procuring a policy for that amount.

Indemnification of the mortgagor, therefore, could not have involved the payment to it of any sum in excess of the amount for which it was liable to respond to the mortgagee. The latter having incurred no liability for insurance premiums, the mortgagor incurred no liability to it therefor, and, consequently, there was nothing for which the grantees could be called upon to make indemnity.

(*d*) As has already been shown policies of insurance against fire are not incidents to the property insured and do not represent the property, but are the product of independent contracts with which the mortgagee, unless named in the policy, has no privity. Hence there can be no relation between the fund arising from the contracts between the appelles and the insurance companies, by the terms of which the mortgagee was expressly excluded from beneficial enjoyment, and the alleged contract of indemnity, which, if it ever existed, was expressly discovered by the appellees.

Louis e Marshall.



IN THE

# SUPREME COURT of the UNITED STATES

*OCTOBER TERM, 1900.*

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FARMERS' LOAN AND TRUST COMPANY

*versus*

PENN PLATE GLASS COMPANY.

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**Application of the Penn Plate Glass Company to the Court to advance the above-entitled case for Argument.**

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This case is brought into this Court by Writ of *Certiorari*, issued to the Circuit Court of Appeals for the 3d District.

The Writ was issued in November, 1900, notwithstanding the earnest opposition of the Penn Plate Glass Co.

The Penn Plate Glass Company (hereinafter called the Penn Company), now most respectfully asks the Court to advance the case for Argument on such early day in the October Term, 1901, as the Court may see fit to name, and it now states briefly the reasons for its Application.

(1.)

The origin of the case was a Bill in Equity filed by the Trust Company in the Circuit Court for the Western District of Pennsylvania, to foreclose a mortgage, as long

ago as July 8, 1896, upon the Real Estate and Glass Manufacturing Plant, the Equity of Redemption in which, at that time, belonged to the Penn Plate Glass Company, but which, at the date of the mortgage, (July 1, 1891), belonged to the *Pennsylvania* Plate Glass Company. The mortgage was given to secure $250,000 of mortgage bonds, the Trustee under the mortgage being the above-mentioned Trust Company. After the Bill was filed, answers were put in making defences to the foreclosure, and making further defences attacking the validity of a portion of the mortgage bonds. While these proceedings were pending, a fire, which took place in April, 1898, almost entirely destroyed the whole manufacturing plant.

When the Penn Plate Glass Company acquired the property, it procured insurance on the Equity of Redemption in a large number of Insurance Companies, the whole amount of insurance aggregating $450,000. In each one of the Policies it was expressly stated that the insurance was only on the Equity of Redemption and not upon the interest of the mortgagee. Upon the occurrence of the fire, a Supplemental Bill was filed by the Trust Company against the original defendants, to which also the insurance companies were made parties, in which Bill the Trust Company claimed an Equitable Lien on the insurance money for the benefit of the mortgage bondholders. Some time thereafter, Mr. Emmanuel Wertheimer, who was one of the largest stockholders of the Penn Company, and the holder of $160,000 of the mortgage bonds, was appointed Receiver in the case to collect the insurance money and to hold $125,000 for the benefit of the remaining ninety of the mortgage bonds, in the event that it should be determined that the mortgage bonds had any title to the insurance money, he (Mr. Wertheimer) stipulating that the 160 bonds held by him should not participate in the insurance money. All of the insurance money except the $125,000 was paid over to the Penn Company.

Upon February 24, 1899, the District Judge filed an Opinion to the effect that the Trustee under the mortgage had an Equitable Lien upon the insurance money, and overruling all the defences made to the foreclosure of the mortgage. Upon July 25, 1899, a final Decree was entered in the Circuit Court for the Western District of Pennsylvania, fixing the amount of the mortgage indebtedness due, ordering a foreclosure of the mortgage for its payment, ascertaining that the mortgage property was not sufficient to pay this mortgage indebtedness, and ordering the Receiver to apply so much of the $125,000 as should be necessary to pay in full such of the 90 bonds as should thereafter be held to be valid bonds, after crediting these bonds with their pro rata share of the proceeds of sale of the mortgage property.

(2.)

From so much of this Decree as awarded an Equitable Lien on the Insurance money in favor of the bonds, the Penn Company appealed to the Circuit Court of Appeals for the Third District.

This appeal came on to be argued in that Court in October, 1899; and after it was argued the case was held *sub curia* until the spring of 1900, when a reargument was ordered, and the case having been again reargued was decided in favor of the Penn Company on June 14, 1900, the Court reversing the decree of the Court below and decided that there was no equitable lien upon the insurance money in favor of the bonds, but that the Penn Company was entitled to the whole of the insurance money.

(3.)

It was to bring up this Decree of the Circuit Court of Appeals, that the Writ of *Certiorari* was granted by the Supreme Court of the United States.

(4.)

The $125,000, which has thus been in the hands of the Receiver since the Spring of 1898, and therefore bearing no interest, (and in connection with which the Receiver was required to give bond to the Surety Company, which costs those interested in the fund $900 a year), must, unless this case is advanced, so remain for a long time yet to come. Since the decision of the case by the Circuit Court of Appeals, 28 of the 90 bonds for whose benefit the $125,000 was decreed by the Circuit Court to be held (this being reversed by the Circuit Court of Appeals) have been found by the Master not to be entitled to share in the $125,000. It would thus appear that while the case is undetermined in this Court, the $125,000, which, if the Decree of the Circuit Court of Appeals is right, belongs to the Penn Company, is withheld from it, and bears no interest, for the possible benefit of 62 of the mortgage bonds.

Since the decision of the case by the Circuit Court of Appeals, the mortgaged property has been sold, and it is of great importance to the Penn Company that it should be enabled to wind up its affairs; but this can not be done until there is a decision by this Court of the pending case.

It is respectfully submitted, that as this Court exercised the extraordinary remedy of *certiorari*, and so has prevented the receipt by the Penn Company of the above-mentioned $125,000, a portion of the insurance placed by it on its Equity of Redemption in the mortgage property, (the policies expressly declaring that the insurance *was not for the benefit of the mortgagee*), and to which money, by the Decree of the Circuit Court of Appeals, it is entitled; and inasmuch as very great delay has already occurred in connection with the Argument and re-argument in the Circuit Court of Appeals; and as the necessary further delay

which will occur, if this case is not heard before it is reached in regular course, will be a serious detriment to the Penn Company, and those interested in its affairs, that Company hereby respectfully asks that this Court may be pleased to grant its Application.

All of which is respectfully submitted.

BERNARD CARTER,
S. SCHOYER, JR.,
S. B. SCHOYER,
*Of Counsel for Penn Plate Glass Co.*

# Supreme Court of the United States.

No. 180.—October Term, 1901.

The Farmers' Loan and Trust Company, Trustee, Petitioner, *vs.* The Penn Plate Glass Company et al. | On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 2, 1902.]

This is a suit in equity, brought by the petitioner, in the United States Circuit Court for the Western District of Pennsylvania, and the case comes here on certiorari to the Circuit Court of Appeals for the Third Circuit. The suit was commenced to foreclose a mortgage given January 1, 1891, by The Pennsylvania Plate Glass Company (hereinafter called the mortgagor company) upon its property in the county of Westmoreland and State of Pennsylvania, to complainant, The Farmers' Loan and Trust Company, a corporation of New York, to secure the payment of $250,000 of bonds then to be issued by the mortgagor company. A supplemental bill was filed, by leave of the court, which averred a loss by fire of a large portion of the premises mortgaged, and on the allegations contained in the supplemental bill the complainant asked that a decree should be entered granting to it a lien on the insurance moneys to the extent necessary to pay the bondholders the balance which might be due, after applying to their payment the proceeds of the sale of the property mortgaged. A decree was entered by direction of the Circuit Court, providing for the foreclosure and sale of the property and for the application of the insurance moneys as prayed for. Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed as to the insurance moneys, and the court below was directed to enter a decree that those moneys should be paid to the defendant, The Penn Plate Glass Company, Circuit Judge Acheson dissenting. The opinion of the judge of the Circuit Court, as well as those delivered in the Circuit Court of Appeals, will be found reported in 103 Fed. Rep. 132.

The material facts in the case are as follows: The Farmers' Loan and Trust Company is a corporation of the State of New York. The defendant, The Pennsylvania Plate Glass Company (the mortgagor company), is a corporation of the State of Pennsylvania, organized for the purpose of constructing and operating plate glass works in the city of Irwin in that State. The defendant, The Penn Plate Glass Company, is also a corporation of the State of Pennsylvania, and is also organized for the purpose of constructing and operating plate glass works in the same city. The defendant William

L. Kann is a citizen of the State of Pennsylvania. On January 1, 1891, the mortgagor company executed to the complainant trust company a mortgage on its property in Westmoreland County, Pennsylvania, to secure the payment of $250,000 of bonds as therein stated. Among other things it was provided by article 1 of the mortgage that, until default should be made in the payment of the principal or interest of the bonds secured by the mortgage, or in the performance of some one or more of the covenants, stipulations or agreements required by the mortgage to be kept, performed or done by the mortgagor, it was to be permitted to possess and operate the premises and glass works with the appurtenances described in the mortgage.

By articles 2 and 3 it was provided that in case default should be made in the payment of any installment of the interest on any of the bonds or of any of the coupons accompanying the same, or in the performance of any of the covenants, agreements or stipulations contained in the mortgage and thereby required to be kept and performed by the mortgagor, and if such default continued for six months after demand made in writing, the mortgagee might take possession of the property, or foreclosure proceedings might be taken.

By article 4 the mortgagor is exempted from all personal liability for the mortgaged debt, and from the obligations of the other covenants contained in the mortgage, the article providing as follows:

"It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

It was provided by article 10, among other things, as follows:

"The right of action under this indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this

indenture, for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion; but the trustee shall be under no obligation to institute any such suit, or to take any proceedings under this indenture, or to enter any appearances, or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees, and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such request or demand. The trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such trustee, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

"The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same; and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property and premises."

Many other provisions and conditions were contained in the mortgage, which are not material to be mentioned.

Most of the moneys arising from the issuing of these bonds were applied towards the construction of the plant of the mortgagor company at its place of business in the city of Irwin, Pennsylvania. The company soon got into financial difficulties, and about January, 1894, the defendant Kann became a stockholder therein and was elected its treasurer. By March 19,

1894, the company had become involved in litigation, and was very greatly embarrassed financially, and some of the other officers of the company had disagreements with Kann in regard to his advances of money, so that on the day last named a bill in equity was filed against the company, in the name of some of its creditors and directors, in the Court of Common Pleas of Westmoreland County, Pennsylvania, praying among other things for the appointment of a receiver of the property of the company, and for a decree winding up its business. In that suit Joseph W. Stoner, the then secretary of the company, was appointed receiver, and such proceedings were had therein that on or about June 18, 1894, the court made an order for the sale of all the property of the mortgagor company, and the same was sold at public auction to defendant Kann for the sum of $37,500, he being the highest bidder at the sale, which was open and public, and attended by others who made bids on the property. The sale was made subject to the mortgage to the complainant, and a deed was given by the receiver, pursuant to the order of the court, to Kann, the deed bearing date July 2, 1894, and reciting that the property was thereby conveyed "subject to a mortgage made by said Pennsylvania Plate Glass Company to The Farmers' Loan and Trust Company of the State of New York, dated first of January, 1891, recorded in Westmoreland County, in mortgage book No. 43, page 1," and being the mortgage or deed of trust made to complainant as stated. Kann continued in possession as owner of the property under this deed from the receiver until about July 1, 1895, when he conveyed, by deed dated on that day, all of the mortgaged property, together with the improvements made thereon by himself, to the defendant, The Penn Plate Glass Company, for a consideration named in the deed of $83,500. Kann in his evidence says the consideration really amounted to $118,000. The deed from Kann to the company also recited that the property therein conveyed was "subject to a mortgage made by said Pennsylvania Plate Glass Company to The Farmers' Loan and Trust Company of the State of New York, dated first of January, 1891, recorded in Westmoreland County, in mortgage book No. 43, page 1."

While Kann held the property he paid the interest on the bonds, but default was made in the payment of the coupons maturing on July 1, 1895, and no coupons have been paid since that time.

There was some insurance on the property when it went into the hands of the receiver in the suit which was commenced to wind up the affairs of the company, a portion of which insurance had not been paid for at the time of the appointment of the receiver, and he thereupon secured directions from the court to maintain the insurance, and for the purpose of paying the premiums thereon he issued receiver's certificates under the order of the court. Some but not all of this insurance was still in force when the receiver turned the property over to Kann at the time of the deed, July 2, 1894.

This insurance expired by the lapse of time, and afterwards, and while Kann was in possession of the property under his deed from the receiver, he procured insurance upon his own interest therein and in his own name. These policies subsequently expired. The Penn Company when organized, and after it had purchased the property, took out insurance in its own name upon the same and for its own benefit exclusively, the amounts running from $250,000 to about $400,000, and the policies containing this provision: "This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders." There was no insurance on the property during the time that The Penn Company owned it, other than as just stated, but that insurance was to an amount more than sufficient to secure the bondholders under the mortgage if the moneys were to be so applied.

While the property was in the hands of Kann and after the insurance thereon had expired, which had been procured by the mortgagor company or by its receiver, the mortgagee notified Kann and required him to keep up or renew or take out other insurance for the benefit of the bondholders under the mortgage, up to the amount thereof, and the same notice and requirement were given to and demanded of the mortgagor company. That company made default and Kann refused to take out any such insurance, and denied that he was under any obligation so to do. After Kann sold and conveyed the property to The Penn Company, the complainant notified that company and required it to insure in a sum sufficient to afford security for the bondholders under the mortgage to complainant. The Penn Company refused to so insure and denied any obligation to do so, but, on the contrary, did insure for its own benefit, the policies of insurance containing the provision excluding the interest of the bondholders under the mortgage.

As stated, the mortgagor company, and also Kann and The Penn Company, defaulted in the payment of the coupons due July 1, 1895, and upon those due January 1 and July 1, 1896, and thereupon complainant commenced this suit by the filing of its bill July 8, 1896, asking for the foreclosure of the mortgage, and making the mortgagor company, Kann and The Penn Company defendants. On the same day a motion for a receiver was noticed on the ground that the mortgage was not good security for the debt. The mortgagor company made default and has not appeared in the suit. The other defendants duly appeared and opposed the motion. It was heard on July 20, 1896. Shortly after the motion had been argued counsel for the complainant received notice from the judge before whom the motion had been made, stating that he had concluded to deny the application for the appointment of a receiver. Upon a subsequent day, the parties being in court, (no formal order denying the motion having as yet been filed,) the counsel for the complainant said to the court that in

the motion for a receiver it occurred to him that the court had not considered the fact that this property was without insurance; that there was danger of fire; that the plaintiff was a trustee without funds, and that that was a matter that ought to be considered; that the trustee was entitled to insurance. Counsel upon the other side denied that they were bound to insure under the terms of the mortgage, and so the dispute continued before the judge, counsel for the complainant insisting that complainant should have insurance and counsel for the other side denying that complainant was entitled to it at the cost of the defendants, and at the end the judge remarked that he could not then decide that question, but intimated to counsel for defendants that if they were bound to insure they ought to protect the complainant as trustee and mortgagee. Finally it was suggested that a bond should be given of the tenor now to be mentioned, but counsel for complainant stated in his evidence upon the subject given in this case, that he did not wish to be misunderstood, and that it must be admitted that counsel for the defendants, upon the occasion mentioned, expressly denied that they were bound to insure for the benefit of the bondholders; the bond or agreement was given just as its terms set forth, that if defendants were bound to insure the insurance would stand for the benefit of the complainant, and if not, the complainant would get nothing. The bond or agreement was then given by Emanuel Wertheimer and defendant Kann. It was put in evidence, and Wertheimer and Kann therein agreed "that in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such valid bonds, out of the policies of insurance existing in favor of The Penn Plate Glass Company. Provided, that it shall have been finally adjudicated that The Penn Plate Glass Company, the present owner of said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage." This agreement was given, as counsel for complainant stated, in order to meet the views of the court, "that if I was entitled to insurance I should have a bond, and if I was not entitled to insurance, I would get nothing."

By an interlocutory order, as mentioned in the decree subsequently entered, and grounded upon this agreement, the court appointed Emanuel Wertheimer as receiver for the purpose of receiving the insurance moneys under the various policies of insurance, and, pursuant to such appointment, Wertheimer was directed to hold, as such receiver, $125,000 of the insurance moneys so collected, and if it should be finally decreed that the com-

plainant had an equitable lien upon such insurance moneys, then the receiver was to pay over to the complainant so much of that sum as should be necessary to pay and discharge the $90,000 of the bonds secured by the mortgage, not including the $160,000 of such bonds belonging to Wertheimer, in regard to which he released and waived all claim to an equitable lien upon the said sum of $125,000 so collected and held by him, and he was also to pay to the complainant and discharge the coupons upon such $90,000 of bonds.

The formal order denying the motion for a receiver was filed September 7, 1896. Considerable testimony was taken in the case subsequently to that time upon the various issues made by the pleadings, but the trial had not been concluded, when on April 12, 1898, a fire occurred, by reason of which, as claimed on the part of the mortgagee, the greater part of its security was destroyed. A supplemental bill was then filed by complainant by leave of court, and various insurance companies which had insured the property for The Penn Company were brought in as parties to the suit, and the complainant demanded, in addition to the relief which was prayed for in the original bill, a decree providing that the complainant should have a first lien on the insurance moneys paid or to be paid under such policies for the purpose of paying the bondholders holding the $90,000 of bonds as above mentioned, any balance which might be due them after the sale of the mortgaged premises should be made, if such sale should result in any deficiency in the payment of those bonds.

Testimony was taken relative to the averments contained in the supplemental bill. It was proved on behalf of The Penn Company that since Kann and The Penn Company had the title to and possession of the property, there had been spent by them upon the property, by way of repairs and improvements, between $180,000 and $200,000.

The decree of the Circuit Court, after providing for the foreclosure and sale of the mortgaged premises, made specific provision for the application of the insurance moneys in the hands of Wertheimer to the payment of any deficiency that might arise, after applying the proceeds of the sale of the mortgaged property to the payment of the bonds mentioned in the decree.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The only question involved in this case arises from the provision made in the decree by the Circuit Court Judge, impressing what is termed an equitable lien upon the insurance moneys collected on the policies taken out by The Penn Company, sufficient to pay any balance which may remain unpaid on the bonds secured by the mortgage to complainant, after the application of the proceeds of the sale of the property mortgaged. The Circuit Court held that the complainant had such equitable lien,

while the Circuit Court of Appeals, Judge Acheson dissenting, was of the contrary opinion, and therefore reversed that portion of the decree which provided for it.

The policies upon which the moneys were collected to pay the loss happening by fire, were taken out by The Penn Company for the purpose of covering its own interest in the property, and the language of the policies covered such interest only. There was no contract in the policies covering the interest of the complainant as mortgagee, nor was the insurance, in fact, effected for the purpose of carrying out any agreement or obligation on the part of The Penn Company with the complainant to effect insurance covering the interest of the bondholders. On the contrary, this purpose was disaffirmed and the obligation denied. The Penn Company had the right to insure its own interest, and unless there were some contractual obligation on its part on the subject, which bound it, or some conduct on its part, or on the part of Kann, its immediate grantor, which would estop it from setting up the fact that it had procured the insurance for itself, the moneys arising out of the contracts which it made with the various insurance companies, cannot be taken from it and bestowed on the complainant for the benefit of the bondholders secured by the mortgage in suit. Some obligation of the defendant of a contractual nature must exist, or some conduct must be proved, estopping the defendant from denying such obligation, before the court can be authorized to take such moneys and bestow them upon the mortgagee for the benefit of the bondholders.

The complainant asserts that, without regard to any provision in the mortgage, it has an equitable lien upon The Penn Company's insurance, and that, under the circumstances, such company must be treated as in the position of a receiver appointed on complainant's motion in this case. The peculiar circumstances upon which the claim is based that defendants should be so treated, seem principally to be the denial of complainant's motion for the appointment of a receiver at the time of the commencement of this suit to foreclose the mortgage, and the fact that The Penn Company had insurance on the property. The denial of the motion for a receiver, it is averred, was brought about by the opposition of the defendants Kann and The Penn Company, and it is argued that they ought not to have opposed the motion, and their opposition was improper and in bad faith. But it must be remembered they were parties to the suit, and in the legal protection of their rights it was perfectly proper for them to oppose, before the court, the appointment of a receiver, even though their opposition secured the denial of the complainant's motion. We see nothing upon which to base an accusation of bad faith in this conduct of defendants. The complainant, however, regards the application for a receiver as the same in substance as an application to take possession of the premises in pursuance of the provisions of the mort-

gage, consequent upon a default in the payment of the principal or interest of the bonds, or because of a violation of any other of the covenants contained in such mortgage. Even if that be so, we see nothing in such fact to in any way alter the right of defendants to oppose by argument before the court the appointment of a receiver. There is no pretense that they made any allegations upon the hearing which were untrue or that their opposition was based upon anything other than conceded facts. Possibly the Circuit Court ought to have appointed a receiver upon the application of the complainant. That was a matter resting a good deal in its sound discretion. The Penn Company and Kann were, however, entirely within their legal rights when they opposed such application, and we are unable to see that their conduct in so doing in any manner altered those rights or added to their own legal obligations. Very likely a receiver, if he had been appointed, would on his own motion have taken out insurance upon the property, or would have been directed by the court to do so, in order to cover the interest of the bondholders. But no receiver was appointed and no such insurance was taken out, and we cannot see that the defendant, The Penn Company, has in any manner made itself liable to pay to the complainant any of the insurance moneys which it obtained to cover its own interest only, in the property, because of the successful opposition made by it to the appointment of a receiver.

The court on hearing all sides and interests denied the application. There was nothing which then prevented the complainant from itself taking out insurance under the tenth article of the mortgage. It could have taken out such insurance as a thing proper to be done by it as trustee within the provisions of the mortgage, and in such case it would have been entitled, by the specific provisions in the tenth article, to reimbursement therefor and to compensation from the trust fund. We do not say that it was its duty to do so, for it had no cash of the mortgagor on hand, but it had the power under the article to advance the insurance premiums and the right to demand reimbursement and compensation for having done so. The fact that it had no funds at its command at that time is very likely an answer to the proposition that it was its duty to have itself procured insurance; but if it had advanced the money and thus procured the insurance, the amount which it advanced would have been a lien on the trust fund and payable thereout before any claim on the part of the bondholders could have been asserted. The risk of loss to the complainant by making such advances would have been nothing. We refer to the subject to show that the mere fact that the trustee was without actual cash in hand to procure the insurance is not material.

Nor can we see that the execution of the agreement soon after the court had decided to deny the application for the receiver, in any way affects the liability of the defendants on this branch of the case. From the time

that Kann bought the premises on the receiver's sale and took a deed therefor subject to the mortgage, he denied any liability on his part to insure the premises for the bondholders, and refused so to do, and The Penn Company from the time it became the purchaser of the premises, also denied any liability to insure and refused to do it. The denial of this obligation to insure and the refusal on the part of both Kann and The Penn Company had been explicit, open and continuous from the time the property had first been acquired up to the hearing upon the motion for a receiver. Whether the defendants or either of them were bound to insure for the benefit of the bondholders was a question which the Circuit Court said it could not decide at that time. This was after the court had stated its determination to deny the motion for a receiver. Finally it was agreed between counsel wh were then before the court that Kann and Wertheimer would sign an agreement that in the event of a loss by fire there should be paid to complainant out of the policies of insurance existing in favor of The Penn Company a sum equal to the total amount of valid bonds secured by the mortgage, provided it was finally adjudicated that the company, the then owner of the property, was bound or liable by anything contained in the mortgage or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the mortgage.

We do not see that this agreement altered in any degree or added to the rights or obligations of the defendants in regard to insurance on the premises. The agreement simply was that if the defendants were bound to insure, then they would take moneys arising from the insurance policies sufficient to pay the bonds. Whether they were or were not so liable was not determined or in any way intimated. If the court had then decided that they were liable, they would have had the opportunity of placing the necessary amount of insurance to cover the interest of the bondholders in addition to that which The Penn Company then had covering its own interest, but no such decision was arrived at and no such order was made and no extra or other insurance taken out, and all parties seemed to be content to rest upon their legal rights and to take the risk of an error as to what those rights were. To make a decree after a loss has happened, by which the moneys arising from policies covering only the interest of The Penn Company and procured by it as security for such interest against the loss of property by fire, requires the existence of an obligation on the part of that company founded upon considerations other than the fact that it had opposed the appointment of a receiver, and that the agreement had been made in the circumstances mentioned. In our view there are no facts disclosed by this record which authorize or justify the court in regarding the defendants in the same light as if they were receivers appointed upon the motion made by complainant in this suit and as such had taken out these policies. The court

with all the facts before it refused to appoint such receiver, and the fact that these defendants, Kann and The Penn Company, successfully opposed the appointment, furnishes no tenable ground to regard them as receivers because of such successful opposition. This ground of liability must, therefore, be rejected.

While it is true that as a consequence of this voluntary agreement entered into by Kann and Wertheimer, the latter was appointed a receiver to collect and hold a sufficient amount of the insurance moneys to pay these bonds, and in that way the moneys may be described as being in court, yet the court did not obtain jurisdiction to make any disposition of those moneys in behalf of complainant except upon the conditions made in the agreement, by virtue of which alone the moneys came under its immediate control. Unless the court held that there was a liability, as expressed in the agreement, it obtained no jurisdiction over these moneys to make a disposition of them in accordance with general equitable principles. There is no fund in court to be thus disposed of. We must confine ourselves, therefore, strictly to the question of whether there was a right on the part of the complainant to enforce the application of these insurance moneys, in the hands of the companies or of the defendants, to the payment of these bonds, and a corresponding liability of defendants to apply these moneys for the benefit of the bondholders, free from any assumed power of the court to make a disposition of the funds on general equitable principles because they are in its possession, and to that extent subject to its immediate control.

In this view, we must ask was there any obligation resting upon these defendants to insure by reason of the contents of the mortgage and of the deeds under which The Penn Company now claims title? In order to determine whether there was an obligation of this nature it must first be decided there was such obligation on the part of the mortgagor company, because if that company was never under any obligation to insure, it is clear that the grantees subject to the mortgage were also free from any liability of that nature.

It is claimed that the mortgagor company became liable to insure by reason of the provision in article tenth of the mortgage, or at least that it became thus liable to insure, when under that provision, it was required to do so by the mortgagee. That portion of the article directly in question here, after providing that it should be no part of the duty of the trustee to do certain things therein named, continued: "Nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may in its

discretion do any or all of the matters and things in this paragraph set forth or require the same to be done."

It is argued that by this language a covenant arose on the part of the mortgagor, by which it covenanted to insure the property if required to do so by the mortgagee. Reading the whole of that article with the other provisions of the mortgage, we think there is great force in the reasoning of Judge Gray in the Circuit Court of Appeals, by which he concludes that there was no original obligation imposed by the mortgage on the mortgagor to insure for the benefit of the mortgagee. But we do not ourselves decide that no such obligation existed The Court of Appeals did not place its determination upon that ground alone, but after discussing it and coming to the conclusion which it did, it then proceeded to discuss the question whether the defendant company was liable upon the assumption that there rested upon the mortgagor an original obligation imposed upon it by the mortgage to insure for the benefit of the bondholders. We will make the same assumption, and the inquiry then arises as to the obligation of the defendants to themselves insure for the benefit of the bondholders after they respectively became the owners of the equity of redemption in the premises.

Kann became the purchaser under a receiver's sale ordered by the court and pursuant to its directions, and he received from the officer conducting that sale a deed conveying to him the premises subject to the mortgage of the complainant. He thus occupies the position of a purchaser at a judicial sale which was ordered to be made subject to the lien of an existing mortgage upon the premises to be sold, and he made no agreement which in terms obligated him to pay a dollar of the mortgage or to comply with a single one of the covenants of the mortgagor. Whatever his obligations may have been in regard to the mortgage or to the covenants of the mortgagor arising from the simple fact of his taking a deed subject to that mortgage, the obligations of his grantee are no greater than his own. The Penn Company took the title which he had subject to the same mortgage as in his case, and with no promise on its part, in terms, to pay the mortgage or to insure the premises for the benefit of any other interest than its own.

Counsel for the complainant argue that the extent of the obligation of grantees or purchasers subject to a mortgage in Pennsylvania has always been, at the least, that by taking such a deed the grantee impliedly agrees to indemnify the grantor against his liability on the mortgage. Many cases are cited by the parties on both sides in relation to this question.

In *Moore's Appeal,* (88 Pa. St. 450,) decided in 1879, Chief Justice Sharswood, delivering the opinion of the court, it was held that such a clause was a covenant of indemnity only, as between the grantor and the grantee for the protection of the former. Or, in other words, it was held that on

taking the land the grantee will indemnify the grantor to the extent of the mortgage, in the same manner as if the consideration had been paid in cash and then applied by the mortgagor at the time. It was also held that an agreement to pay the encumbrance might be implied from the circumstances of any particular case. In the course of his opinion the Chief Justice reviews many prior cases in that State, and, in speaking of the words "subject to the mortgage thereon," said:

"Why should a covenant be inferred from these words by the vendee to the vendor to do more than protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist why should he exact anything more than indemnity? Surely, then, something should appear to create the inference of such a covenant. The words 'under and subject' import that the vendee takes the land encumbered, and at most that so taking it at an agreed consideration, which includes the encumbrance, he will indemnify the vendor to the extent of that consideration, in the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the common use of language, they were entering. The act of assembly of June 12, 1878, (Pamph. L. 205,) has very wisely provided that the grantee shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance."

In *Blood's Executors* v. *Crew &c. Company,* (171 Pa. St. 328,) the import of the clause "under and subject to the lien of" a mortgage was under consideration, and it was held that an implied covenant to indemnify arose from that language. It was also held that the vendor had no right of action against the vendee in such a deed until he had been forced to pay the mortgage, either in whole or in part. This was also held in a case between the same parties, reported in the same volume (171 Pa. St.) at page 339.

The act of June 12, 1878, of the Pennsylvania legislature, (P. L. p. 205,) provides as follows:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other encumbrance shall not be personally liable for the payment of such ground rent, mortgage or other encumbrance unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability therefor: *Provided*, That the use of the words 'under and subject to the payment of such ground rent, mortgage or other encumbrance shall not alone be construed so as to make such grantee personally liable as aforesaid.'"

Under the various cases cited, and the statute above quoted, we may assume that by the law of Pennsylvania the grantee who simply takes a deed subject to the lien of a mortgage is at most nothing more than an indemnitor of his grantor against the payment of the mortgage or any part of it by such grantor. There is no liability on the part of the grantee to the mortgagee so that the latter has any cause of action against him for the payment of the mortgage. If the mortgagor be not liable to pay at all there is no liability resting on the grantee to pay.

It then becomes necessary to determine what liability, if any, rested upon the mortgagor. By reference to the fourth article of the mortgage, already set forth in the statement of facts, it will be seen that there is no personal liability on the part of the mortgagor. There is no obligation, therefore, on the part of The Penn Company to indemnify the mortgagor company for any personal liability to pay the mortgage or any part thereof, for no such liability exists. However much below the amount of the mortgage the land should sell for is, so far as this question is concerned, a matter of no legal interest to the mortgagor company, and the fact in no way creates any liability on its part. As there was no liability on the part of the mortgagor to pay any portion of the debt secured by the mortgage, and the liability, if any, to indemnify the mortgagor on its covenant to insure is, as stated by the judge delivering the opinion of the Circuit Court of Appeals, incidental and subordinate to its liability to indemnify the mortgagor regarding the mortgage debt, no such liability to indemnify upon the insurance covenant would seem to rest upon the defendant company or upon Kann, because there is none such existing in relation to the mortgage debt itself.

The covenant to insure does not run with the land, so that one taking a conveyance comes under a primary obligation to insure, over and above that of a mere indemnitor. (*Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507, 513; *The City of Norwich*, 118 U. S. 468, 494.)

But, assuming the law of Pennsylvania to be that there is an obligation on the part of these defendants, by reason of their taking the deeds subject to the mortgage, to indemnify the mortgagor on its covenant to insure, contained in the mortgage, what is the extent and character of that obligation thus assumed? The covenant on the part of the mortgagor, which we assume exists by reason of the language contained in the mortgage, was a personal obligation or covenant. The question then arises, what consequences would follow upon a breach of the covenant by the mortgagor? Suppose it had not conveyed the property and still remained the owner and in possession, and yet refused or omitted to insure, as it had covenanted to do in the mortgage, what remedy under this mortgage existed because of this violation by the mortgagor? The complainant might have taken out insurance and claimed reimbursement or added the premiums paid to the

amount of the mortgage debt. It did not do so. What other remedy it had for a violation of any covenant by the mortgagor is stated in the mortgage. It is therein expressly understood and agreed between the parties "that no other suit or proceeding for the collection of the bonds shall be commenced, except such suits or proceedings as shall be necessary to recover the possession of the premises mortgaged, or to subject the same to the payment of the debts, and that the sale of the mortgaged premises, whether under the power of sale granted or any other power of sale, or by or under any judicial proceeding whatsoever, *shall operate as a full and complete satisfaction and discharge of the indebtedness of the mortgage and of the obligation of the covenants therein contained*, whether the premises should be bidden in for the whole amount of the indebtedness or for a less price, anything in the bonds or coupons to the contrary thereof notwithstanding." The sale of the mortgaged premises is by the specific terms of the mortgage to operate as satisfaction of all the covenants contained in the mortgage. And in asking for the sale of the property, by the commencement of this suit, complainant cannot add to the relief it is entitled to by a sale, any other or different relief than that. By the express provisions of the mortgage there was not only an exemption of personal liability for the payment of the bonds and coupons, or any part of them, but there was also an exemption of all personal liability on account of the obligation of any other covenant contained in the mortgage; such exemption covering not only the obligation to pay the debt, but also any other covenant. Hence the obligation to indemnify the mortgagor on account of any failure by it to insure does not exist, because there is no liability on the part of the mortgagor to answer for its breach of covenant in any other way than by complainant taking possession of the premises, or by a foreclosure of the mortgage and sale thereunder. The mortgagor having conveyed the premises, has no further interest in them, and hence their sale under the mortgage would be no damage to the mortgagor, and no case for indemnity to it would be made out.

The alleged contractual obligation to indemnify, as well regarding the covenant to insure, as that regarding the payment of the bonds and coupons, does not help the complainant in this case, because of the affirmative provisions of the mortgage. Whether the sale, under the foreclosure prayed for in this case, has taken place or not, there is no other or personal liability of the mortgagor to respond for its breach of covenant to insure than that which it has provided for in the mortgage. If it be under none other, then the indemnitor has nothing to indemnify.

In regard to the contractual obligation to insure on the part of defendants, which complainant avers exists as one of the foundations for the equitable lien claimed by it, the judge, delivering the opinion of the Circuit Court of Appeals, (103 Fed. Rep. 151,) said:

"But apart from cases of fraud, it is only when there is such a contract or promise, which can be so enforced, that courts of equity will recognize for that purpose the existence of an equitable lien. In such case the lien is impressed upon funds or property which, belonging to the promisor, were the very funds or property which constituted the subject-matter of the contract or to which the contract or promise related. It is essential, therefore, that the funds or other property, which are to be charged with the lien, should have, either at the time of the contract or afterwards, and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or of others who may be affected with notice. There must, therefore, exist a contract by the party owning, either *in præsenti* or in expectancy, the property sought to be charged, which directly or by necessary implication, expresses the intention to charge such property with the lien, in favor of the other party to the contract. . . . It is not pretended that there was any contract between Kann or the appellant company and complainant to insure for its benefit, or any promise or declaration of intention, upon any or no consideration, that they, or either of them, would so insure, or that policies or funds arising therefrom should be assigned or charged with a lien in its favor. The first essential requisite to an equitable lien, as above described, is, therefore, entirely wanting. There is no contractual relation of any kind between the mortgagee and the appellant," (respondent in this court) "in whose name, and for whose sole benefit, these policies of insurance were taken out, If such a lien, therefore, exists on these insurance funds, in favor of the complainant, it must be on other grounds than these ordinary and well-understood ones. This is not the case of a mortgagee claiming an insurance taken out by the mortgagor, who had covenanted to insure for the benefit of the mortgagee; nor is it the case of such mortgagee claiming such insurance funds, when they had come into the hands of third persons, 'who are either volunteers, or who take the estate [the insurance funds] on which the lien is agreed to be given with notice of the stipulation.' The complainant does not claim that the funds due on policies taken out by the mortgagor, and which the mortgagor is held to have promised that he would assign to the mortgagee, have come into the possession of the appellant (respondent), with notice, and are, therefore, charged with a lien in favor of the mortgagee. Its claim is that the grantee of the equity of redemption, having taken the property expressly subject to the mortgage, which contained a covenant on the part of the mortgagor to insure, on that ground alone came either under a direct obligation to insure the premises for the benefit of the mortgagee, or under an obligation to indemnify the mortgagor for his liability under said covenant. But the property or 'estate' which came to the hands of the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court here, however, is asked to impress a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject-matter of a promise on its part. It is the first branch of the claim above stated (*i. e.*, the alleged direct obligation) that we are now considering."

We fail to see any contractual obligation on the part of the defendants to insure for the benefit of the bondholders further than we have stated, as indemnitors of the mortgagor for its breach, if any, of its covenants.

The case of *Wheeler* v. *Insurance Company*, (101 U. S. 439,) is founded upon the existence of the obligation of the mortgagor to insure, and it is said that under such circumstances the mortgagee will have an equitable lien upon the money due upon a policy of insurance taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed, and that such equitable lien exists, although the contract provided that in case of the mortgagor's failure to procure and assign that insurance, the mortgagee might procure it at the mortgagor's expense.

If the insurance had been taken out by this mortgagor company, even in its own name, we would have the same principle as decided in the last cited case, and the complainant herein might, as its counsel claim, have had an equitable lien upon the moneys arising from such insurance to the extent of the loss under the mortgage. But here is no such case. The mortgagor did not insure after it lost title to the property under the conveyance by its receiver to Kann, and the insurance that was procured was for the interest of the defendants in the property to the exclusion, in terms, of the interest of the complainant. Although the defendant bought subject to the mortgage and with full knowledge of the insurance covenant, yet it held the property subject only to an obligation on its part, at most, to indemnify the mortgagor on account of the mortgage debt or on account of its covenant to insure, and we have seen that that obligation, under the terms of this mortgage, was of no materiality because by its terms the mortgagor was under no personal liability, and there was, therefore, no subject upon which indemnity could rest.

If there is no contractual obligation arising from the terms of the mortgage, and the taking of the deeds with an "under and subject" clause, as above referred to then there must have been some conduct on the part of the person to be charged which would estop him from setting up as a defense the lack of such obligation. The complainant urges that the defendants have been guilty of conduct which does estop them from denying their liability. This is a different claim from that first remarked upon as to the treatment of defendants as receivers. This claim is based upon a survey of the whole conduct of defendants in connection with the mortgagor company and the insurance upon the property. The record in this case, in our opinion, discloses no conduct on the part of the defendants which estops them or either of them from showing the lack of any obligation on their part to apply any portion of the insurance moneys to the payment of the bondholders. There has been no wrecking of the mortgagor company by either or both defendants, and neither has done

any thing depriving himself or itself of any defense he or it might otherwise have. In other words, both defendants have, so far as this record shows, full liberty to set up as a defense the want of any contractual or other obligation to insure. The opinion of the Circuit Court of Appeals is quite full in regard to this claim, and we feel there is no necessity in ourselves going over this particular ground.

After a careful consideration of the whole case, we are of opinion that the judgment of the Circuit Court of Appeals was right, and it is, therefore,

*Affirmed.*

Mr. Justice GRAY did not hear the argument and took no part in the decision of this case.

True copy.

Test:

*Clerk Supreme Court, U. S.*